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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 653

W. DALTON LARUE, SR.

and

JUANITA S. LARUE, *Petitioners*

v.

STEWART L. UDALL,
individually and as Secretary of the Interior,

and

NORTH AMERICAN AVIATION, INC., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

STEWART L. UDALL,
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NORTH AMERICAN AVIATION, INC., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on October 3, 1963.

OPINIONS BELOW

The opinion of the Secretary of Interior is reported in 69 I.D. 120 and appears at pages 21-32 of the Joint Appendix prepared for the use of the Court of Appeals and filed here

pursuant to Rule 21(4). The earlier opinions of the District Manager, Reno Land Office, and the Associate Director, Bureau of Land Management are unreported and appear in the Joint Appendix at pages 52-58 and 58-66, respectively. The District Court wrote no opinion; the judgment of the District Court is unreported and appears in the Joint Appendix at page 239. The opinion of the Court of Appeals is unreported and appears in Appendix B hereto, *infra*, page 20a *et seq.*

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 3, 1963. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Does the Secretary of Interior possess statutory authority to dispose of public grazing lands under the Taylor Grazing Act of 1934, through the medium of a Section 8(b) private land exchange, to private parties (a) for private industrial purposes, or (b) for national defense purposes, and thereby terminate a grazing license and destroy a ranching operation?

2. Does Section 9 of the Taylor Grazing Act or the due process protections of the Fifth Amendment require that a grazing licensee be given a full hearing, the protections afforded by the Administrative Procedure Act, and access to the administrative record before the Secretary of Interior may terminate his license in the process of consummating a private land exchange pursuant to Section 8(b) of that Act?

3. Does Section 3 of the Taylor Grazing Act prohibit the Secretary of Interior from terminating a grazing license when such action will impair the value of a licensee's grazing unit when it is pledged as security for bona fide loans?

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are the various provisions of the Taylor Grazing Act, 48 Stat. 1269, as amended, 43 U.S.C. Sec. 315, *et seq.* and related land laws. Their pertinent text is set forth in Appendix A, *infra.*

STATEMENT

Since October 1953, petitioners have been owners and operators of a cattle ranch located on public and private land about 30 miles north of Reno within the boundaries of Carson City Grazing District No. 3, Nevada. Petitioners own, in fee some 1,600 acres in five non-contiguous tracts. This "base property" entitles them, under the Taylor Grazing Act and its implementing regulations, to graze on some 10,000 acres of surrounding public domain. Petitioners' grazing rights are embodied in Class 1 annual licenses which the Bureau of Land Management, Department of Interior (hereinafter "BLM") have regularly issued to petitioners and their predecessors. Petitioners' fee holdings, ranching personalty and their range rights are mortgaged as security for outstanding loans.

Due to the railroad grants of the nineteenth century, the land ownership pattern in the area of petitioners' ranch is a checkerboard with land sections alternating in public and private ownership.

In 1958, North American Aviation, Inc. acquired the bulk of the privately owned land in the general vicinity of petitioners' ranch. In order to obtain a cohesive tract to conduct industrial activities of a national defense nature, North America has undertaken to acquire the alternate sections of publicly owned land in the area. The device chosen by North American to obtain this public domain is the private land exchange authorized by Section 8(b) of the Taylor Grazing Act. That provision permits private parties to obtain public land through the exchange of private land of at least "equal value" when "public interests will be benefited thereby."

In July 1958 North American filed private exchange application Nevada No. 048847 to acquire 21 sections of public

land (10,800 acres) located in the heart of the grazing range on which petitioners conduct their ranching activities (the selected lands). In exchange it offered the Government certain barren and unimproved desert lands (the offered lands), located some 100 miles distant in an area where there is no significant grazing activity.

The public lands to which North American seeks title constitute the bulk of the public domain upon which petitioners graze their cattle. These are valuable grazing lands upon which petitioners have made substantial improvements. If the exchange is consummated, petitioners will suffer immediate and irreparable damage: their grazing license and rights will be terminated by the Secretary of the Interior without compensation; their existing ranching operations will be destroyed; the value of the security underlying their outstanding loans will be seriously impaired.

Petitoners' separated fee lands, which would be almost completely surrounded by North American's holdings, are wholly inadequate to support their ranching operation; the little remaining public land in the area would be both inaccessible and insufficient. North American has denied petitioner access to its own lands by entering into an agreement with the Steads, neighboring ranchers to the south, under which it obtained a 40 year first refusal on the Stead ranch and obligated itself to exclude petitioners from grazing on any land which North American owns or may acquire, and from all public land contiguous thereto.[1] By this agreement,

[1] "3. North American shall, to the extent that it has the legal right to do so, exclude from grazing any person, firm, corporation or other business entity, including North American, except William M. Stead, upon the land which North American now or hereafter may own in fee simple within the following boundaries: East of Nevada State Highway 33, South of the Pyramid Indian Reservation, North of Township 20 North, and West of Range 23 East, M.D.B. & M. North American further reserves the right to exclude said William M. Stead from grazing upon all or any part of the above described land of North American, provided that if William

wholly ignored by respondent Udall, the Steads are enabled to graze exclusively on lands respecting which petitioners now possess statutory preferred grazing rights.

Petitioners protested the proposed exchange when they learned of it. On January 26, 1961, the District Manager of the Reno BLM office approved North American's application in part because "the Taylor Grazing Act is a multiple purpose Act, of which measures pertaining to grazing privileges represent only part of the Act's many provisions. Of its many provisions Section 7 of the Taylor Grazing Act clearly provides for disposal of public lands which are valuable or suitable for a higher use than for grazing." (JA 52). On appeal, the Associate Director, BLM upheld the exchange but found that it could be sanctioned only if the public interest in conservation and range management would be benefited.[2]

M. Stead is so excluded, North American shall erect or install adequate fencing between the property and the above described land of North American, or the portion thereof from which William M. Stead is excluded. *North American shall exercise all reasonable efforts to exclude from grazing upon Government land contiguous to the above described North American land everyone, except William M. Stead*, and reserves the right to exclude William M. Stead subject to the provisions set forth above." (JA 34, italics supplied.)

[2] ". . . the Manager erred in his decisions to the extent he implied or ruled that the proposed use of the selected lands by the exchange proponent, in furtherance of space, of missile programs of the Government, is a persuasive factor in determining whether the proposed exchange is in the public interest and in accord with provisions of the Taylor Grazing Act, as amended, *supra*. Considerations of the public interest in a land exchange under the Taylor Grazing Act involve matters related to conservation of Federal resources, i.e., whether the exchange will facilitate the administration of the public lands, e.g., promote the interests of conservation or range management. *The decisions appealed from* are therefore modified to eliminate any reference to any so-called national defense justification for the exchange, this being extraneous to the issue of the public interest in the exchange." (JA 63.)

On August 14, 1962, respondent Udall, as Secretary of the Interior, issued Opinion No. A-29309 upholding the exchange on final appeal. However, he rejected the view of the Associate Director, BLM that the statutory "public interests" criterion related to considerations of conservation and range management; he affirmed the interpretation of the Reno BLM office that the statute authorizes private exchanges which confer national defense and general economic benefits.[3]

At all stages of the administrative process, petitioners made timely demands for a hearing which were denied. They were refused the opportunity to conduct cross-examination on materials in the administrative file. They were denied access to materials contained in the file upon which respondent Udall based his action, a procedure which is a direct violation of governing regulations (43 CFR 146.8(c) and 43 CFR 221.99(d)).

On August 31, 1962, petitioners filed suit in the United States District Court for the District of Columbia, seeking to enjoin respondent Udall from consummating Nevada exchange No. 048847 and from issuing a patent to North American for the public lands involved. This suit invoked the general equity jurisdiction of the District Court on the grounds that respondent Udall's past and threatened actions in the circumstances of this case were without basis in and beyond the scope of his statutory authority and were unconstitutional. (JA 3, *et seq.*)

The case was tried upon cross-motions for summary judgment. On March 6, 1962, the Court, without opinion, granted respondent Udall's motion for summary judgment and dis-

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[3] "I am of the opinion that the benefit to the public interests, which is the criterion of the statute, need not be related exclusively to conservation of Federal grazing resources nor need it be shown that a proposed exchange will promote range management. In my opinion the construction placed on section 8(b) by the manager of the Reno land office is the proper one." (JA 27.)

missed the complaint. Thereupon a timely appeal was taken to the United States Court of Appeals for the District of Columbia Circuit. On October 3, 1963, a panel of the court affirmed the action of the District Court upon a finding that the "public interests" criterion of Section 8(b) of the Taylor Grazing Act is not "limited or restricted in any way." (p. 24a) In a concurring opinion, Chief Judge Bazelon sharply disagreed; he found that the statute authorized only those disposals of public domain which benefit public grazing interests (p. 28a, 30a).

REASONS FOR GRANTING THE WRIT

Introduction

The decision below raises important and basic questions involving the statutory construction and administration of the Taylor Grazing Act. At issue, in the first instance, is the authority of the Secretary of Interior to abrogate statutory grazing rights and destroy a productive ranching operation, and to assert a plenary power to dispose of the public domain for private, industrial uses—all predicated upon a tortured reading of a conservation statute designed to safeguard ranchers. Such action, moreover, by-passes statutory provisions designed to protect the value of petitioners' grazing unit as loan collateral and to provide just compensation when petitioners' grazing rights are to be sacrificed for national defense projects.

As recently as the current session of Congress, respondent Udall has continued his campaign to obtain at least limited *legislative* authority to dispose of public land to private parties for business or industrial uses. The Congress thus far has failed or refused to act. Without waiting for a new grant or redefinition of statutory authority, respondent Udall now has undertaken unilaterally to assert unfettered disposal authority.

Equally important, the administrative action here challenged presents serious statutory and constitutional prob-

lems as to the right of a hearing and access to the administrative record upon which the Secretary of Interior acts. Unless this Court intervenes, ranchers will be deprived of their statutory grazing rights, and their ranching operations and livelihoods will be destroyed, without a hearing and the opportunity to know, scrutinize and cross-examine the material upon which such a decision is based. Private exchange applications, because of the multitude of factual questions presented, urgently require the safeguard of hearings. The Secretary's decision in this case is replete with error both in the factual conclusions reached and in the matters ignored; only a hearing, as required both by the statute and due process, can adequately safeguard petitioners from such erroneous and unfair administrative action.

Agency action on other North American applications and, we believe, other similar private exchanges, are being held in abeyance pending determination of this test case. It is not consistent with the sound administration of justice to defer determination of these recurring and fundamental questions; delay will permit the continued total and uncompensated destruction in the interim of ranching operations.

1. Section 8(b) of the Taylor Grazing Act authorizes the Secretary of the Interior to convey public lands to private parties in exchange for lands of at least equal value when "public interests will be benefited thereby." The critical issue raised by this case is whether Congress in enacting this provision gave the Secretary of Interior virtually unfettered discretionary authority to make wholesale dispositions of the public domain to private parties for private purposes, particularly when such action is in derogation of the purposes of the statute and rights granted thereunder.

Respondent Udall contends that the term "public interest" has no fixed meaning, that potentially it embraces every pos-

sible public interest and that the statutory criterion may be enlarged from time to time to accommodate changing times, conditions and interests. The corollary assertion is made that this authority to dispose of the public domain to private parties is co-extensive with the plenary power which the Constitution gives the Congress to dispose of the public lands (Article IV, Section 3, Clause 2). The Court of Appeals agrees with the latter view. It finds that the "public interests" criterion is not "limited or restricted in any way." (p. 23a). Chief Judge Bazelon wholly disagrees; he finds that the Secretary's disposal power is limited to exchanges which benefit "public grazing interests" consistent with the grazing and range stabilization policies of the Act (p. 28a, 30a).

The decision below ignores the basic axiom that a statutory term takes on color from its context and meaning from the purposes, policies and standards of the statute involved. This is necessary not only to effectuate the legislative will but also to avoid the risk of unconstitutional delegation of statutory power. *New York Central Securities Corp.* v. *U.S.*, 287 U.S. 12, 24-25 (1932).

The Taylor Grazing Act is a conservation measure designed to promote the orderly use of the public range as a national resource and food supply and to define the grazing rights of stockmen and protect such rights against interference (Sec. 2; 43 CFR 161.1(a)); *Red Cannon Sheep Co.* v. *Ickes*, 98 F.2d 308 (D.C.Cir., 1938); *McNeil* v. *Seaton*, 281 F.2d 931 (D.C.Cir., 1960). Both the Senate and House Report stated: "*It should be understood that the whole purpose of the Bill is to conserve the public range in aid of the livestock industry. The Bill makes no disposition of the public domain which comes within its scope but merely provides for the more orderly use of their grazing resources.*"[4]

The disposal power of Section 8(b) is circumscribed by the purposes, policies and standards of the statute. The

[4] H.R.Rep. No. 903 on H.R. 6462, 73rd Cong. 2d Sess. (1934), p. 2; S.Rep. No. 1182 on H.R. 6462, 73rd Cong. 2d Sess. (1934), p. 2.

exchange provision was intended to facilitate effective range management by permitting both the Government and ranchers to consolidate grazing areas for their mutual benefit.[5]

Only a few months after the passage of the statute, Solicitor Nathan Margold, in an opinion approved by Assistant Secretary Oscar Chapman, held that Section 8 authorized such exchanges as "*will benefit the public interests which are enunciated in the Taylor Grazing Act and are served thereby. It cannot be doubted that Congress therein authorized only those exchanges which will benefit the public interests in regulation of grazing on the public range under the Taylor Act. Exchanges other than these would be without legal authority.*" *Land Exchange with States Under Taylor Grazing Act*, 55 I.D. 9 (1934).[6]

Petitioners are issued grazing licenses in view of their entitlement under the Act and implementing regulations as members of a preferred class (Act, Sec. 3) with certain priority rights derived from their ownership of "base lands" which are "dependent by use."[7] The purpose of the Act was to define and confer grazing rights; these rights may not be lawfully evaded by third parties including the Secretary of Interior and his subordinates. *Oman* v. *United States*, 179 F.2d 738 (10th Cir., 1949); *Hatahley* v. *United States*, 351 U.S. 173 (1956). Indeed the Secretary has "an affirmative obligation to absolutely safeguard" these rights granted by statute. *McNeil* v. *Seaton*, *supra*, 281 F.2d at 934. Moreover, Congress expressly gave ranchers who like petitioners

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[5] *Reports, ibid.*, p. 3; 78 Cong. Rec. 6359 (1934); Hearings on H.R. 6462 Before the Senate Committee on Public Lands and Surveys; 73rd Cong. 2d Sess. 16-17, 94-100 (1934); Hearings Before a Subcommittee on the Senate Committee on Public Lands and Surveys, 76th Cong. (1941-45), pp. 6, 905.

[6] The text of Section 8 as originally enacted appears *infra* p. 16a-17a.

[7] 43 CFR 161.1(b); 161.6(b)(1)(i); 161.4(b); 161.2(k)(1); 161.2(k)(2); 161.2(h).

had pledged their grazing units, a vested right to continue to graze which the Secretary himself could not terminate. (Act, Sec. 3, see *infra*, pp. 19-21).

The Court of Appeals has now found that grazing rights may be terminated without compensation and that ranching operations may be totally destroyed for considerations wholly divorced from the purposes of the Taylor Grazing Act to promote conservation and sound range management. Congress could hardly have intended to authorize such action when it enacted a statute which defined and bestowed grazing rights upon qualified ranchers.

Respondent Udall's claim of plenary disposal authority is totally inconsistent with the historic Congressional policy of jealously guarding its constitutional authority to dispose of the public domain. It has forbidden general alienation of public land (43 U.S.C. 671, *infra*, p. 17a) and has limited disposition to a handful of special purpose statutes, none of which authorizes the sale of more than 1,520 acres in a single transaction. As regards disposals to private parties for industrial and commercial purposes, Congress has sanctioned only the sale of small tracts of less than 5 acres, a provision manifestly not applicable here. (43 U.S.C. 682a, *infra*, p. 17a).

Nor is the Congressional policy different with respect to dispositions in aid of the national defense. While Congress permits withdrawals of the public domain for National Defense uses by Governmental agencies and provides for their lease to private contractors,* it maintains a tight rein over such activity. Congress has required that its specific leave be obtained whenever the public land sought to be withdrawn for national defense uses in more than 5,000 acres. (43 U.S.C. 156, *infra*, p. 19a). Moreover, "fair and reasonable" compensation must be paid to ranchers for their lost grazing rights in all cases of national defense with-

* 10 U.S.C. 2667.

drawals (43 U.S.C. 315q, *infra*, p. 18a). Through the device of a section 8(b) exchange, North American here seeks to receive in fee public land which the Department of Defense itself could not use without prior and specific Congressional authorization, and only then upon the payment of appropriate compensation to petitioners for the cancellation of their grazing licenses.

Congress has thus far refused to grant the Secretary even a fraction of the disposal authority which the Court of Appeals now finds he possesses under the Taylor Grazing Act. His repeated requests for legislation to permit dispositions to such private interests as the electronic, aircraft and missile industries have yet to receive favorable action—even though his own proposals were severely limited in extent and qualified by standards and provisions designed to protect ranchers.[9] By his own admission the Secretary, in

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[9] The obsolescence of the public land laws and the need to provide for disposal, with safeguards, of portions of the public domain for industrial and commercial uses continue to be the subject of intense and widespread Congressional concern and activity.

In the current session of the 88th Congress alone, a multitude of proposals are already the subject of consideration. Bills have been introduced and hearings held regarding the conduct of a comprehensive study and review of all public land laws and of the Taylor Grazing Act in particular (H.R. 8070, H.R. 8071, H.R. 8072, H.R. 8073, H.J. Res. 52; Hearings Before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, *Public Lands Review*, Ser. # 11, Part II-*Public Land Law Review Commission* (1963); Hearings Before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, *Review of the Taylor Grazing Act*, Parts 1, 2 and 3 (1963).

The Interior Department continues to press for legislation authorizing disposals to private parties for non-conservation uses. Of the numerous bills now pending, the Department particularly favors the amendment of Section 14 of the Taylor Grazing Act (S. 1600, H.R. 5498). Other measures of importance would provide for a more comprehensive framework for urban, industrial and commercial dispositions (S. 1599, S. 1601, H.R. 255). These bills

the absence of express statutory authority, is seeking to use the private exchange provisions as a "roundabout" method of effecting such dispositions.[10] It may well be that existing land laws are antiquated in light of changing circumstances but it is for Congress, not the Secretary, to amend existing law.

This fundamental issue of the Secretary's authority is not only of widespread importance to the nation's ranchers, but its resolution here is of critical significance for peti-

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place a limitation on such dispositions which range from 640 to 5,000 acres. Most contain standards which require that disposals be considered in light of their effect on the conservation of natural resources and upon the welfare of the individuals involved. (See in particular, *The Public Lands, Background Information on the Operation of the Present Public Land Laws*, prepared by the Subcommittee on Public Lands for the Senate Committee on Interior and Insular Affairs (Aug. 22, 1963); Hearings, House Subcommittee on Public Lands, *Public Lands Review, supra*, serial # 11, Part I—*Use and Disposal of Public Lands.*

Other pending legislation would provide for the amendment of Section 8 of the Taylor Grazing Act (S. 1598, H.R. 5862, Hearings, Subcommittee on Public Lands of the Senate Committee On Interior and Insular Affairs, *Public Land Review*, Part 2 (1963). Bills also have been introduced to provide for the management of the public lands under the principles of multiple use. (H.R. 5159, S. 601 Amendment, S. 1602, House Hearings, *Public Lands Review*, Part 1, *supra.*)

Such efforts to obtain Congressional authorization for urban, industrial and commercial dispositions have been undertaken by the Department, without success, in earlier sessions. Comprehensive bills to this effect were introduced in both the 86th and 87th Congresses (H.R. 7042, S. 1905-86th Cong.; H.R. 7788, H.R. 7789, H.R. 1992, H.R. 5277, H.R. 10454, S. 2219—87th Cong., Hearings Before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, "*Classification and Sale of Non-mineral-Nonagricultural Public Lands*, ser. # 17, 87th Congress.

[10] Interior Department, *Annual Report*, 1961, p. 32-4; Letter of July 14, 1961 to Speaker Rayburn from Assistant Secretary Carver, Hearings before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs. Ser. 17, 87th Congress, *supra*, *fn.* 9, p. 6.

tioners. The Court of Appeals erred in sustaining respondent Udall's action because of its apparent belief that the Secretary had made a finding that North American's exchange would benefit grazing interests and that this constituted a wholly sufficient independent basis of his decision. This was Judge Bazelon's view; the position of the majority is less clear.

A reading of the Secretary's opinion can leave no doubt that the exchange was approved because of the national defense and economic benefits which, it was anticipated, would flow from North American's industrial activities. That rationale thoroughly permeates and is a fundamental basis of the challenged decision. We have no way of knowing how the Secretary would have decided this case if he had known that the principal basis of his decision would be found unlawful.

Respondent Udall's action can only be judged on the basis upon which he has chosen to act. A judicial determination cannot be made to do service for an administrative judgment. *Securities Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87-88, 95 (1943); *Id.* 322 U.S. 194, 196 (1947).

But this is precisely the error into which the Court below falls. In suggesting that the Secretary made an independent finding of grazing benefits, it relies upon random statements which it evidently believes would support such a finding if the Secretary had seen fit to make one. *But the crux of the matter is that the Secretary, in fact, declined to make such an independent finding as the basis of decision.*

The majority merely say that respondent Udall "gave another reason for approving the exchange," when he stated "that acquisition of the offered lands would block out holdings of public lands and would facilitate the administration and management of the area for grazing

purposes."[11] From this the majority feel that the Secretary "seems to have" considered the net impact of the exchange on grazing and range management. (p. 24a). Judge Bazelon thinks that the Secretary's finding of grazing benefit "appears" from two of his statements, including the one relied upon by the majority (p. 28a, footnote 1).[12]

Not only does the majority supply a basis for decision which respondent Udall did not make, but they rely upon a statement which does not even appear in the context of Udall's discussion of the "public interests" which the exchange would benefit. Only *after* making his public interest determination did respondent Udall turn to consider the impact of the exchange on land conservation policies. He did so in ancillary fashion *for the sole purpose of justifying a departure from a then existing policy statement restricting private exchanges.* (JA 31). To raise a few sentences of this ancillary discussion into an independent basis of decision constitutes an improper judicial re-working of an

[11] This statement itself is erroneous. Petitioners requested a hearing, *inter alia*, so that they might effectively demonstrate the following: The offered lands are barren and unproductive desert lands which have sparse forage and almost no water. Because of their steep and rocky topography, they have only a limited potential use as a winter headquarters for sheep. A widespread infestation of the poisonous plant halogeton, however, prevents their use even for this limited purpose. They are unsuited for and cannot now be used for any significant grazing. No federal range demand has ever existed for them. (JA 9-10).

[12] Judge Bazelon also relies on the Secretary's statement that the importance of grazing in the area of the selected lands has lessened in recent years. But the Secretary's observation was based on the belief that North American had taken the fee holdings in the area of the selected lands out of the category of base lands upon which grazing privileges may be issued by refusing to lease its newly acquired land to livestock operators. (JA 30.) In this the Secretary was in error. The fact is that North American has leased these lands to a neighboring rancher (JA 43-45) and the Interior Department has issued a Class I grazing license to it for continued grazing on these very lands. (JA 207.)

administrative determination; it ignores both the essential basis of the action taken and supplies a ground of decision that the Secretary declined to make. Respondent Udall should be given the opportunity to reconsider and restate his views after he is given the benefit of a judicial determination as to the scope of his powers.

2. Petitioners believe that both Section 9 of the Taylor Grazing Act and the due process clause of the Fifth Amendment entitle them to a hearing before their grazing license may be terminated to permit the consummation of a private land exchange. They also contend that they were deprived of due process in being denied access to materials in the administrative file upon which respondent Udall based his action. Such a practice is proscribed by governing regulations (43 CFR 146.8(c) and 43 CFR 221.99(d).[13] In rejecting these contentions, the opinion below raises important questions of statutory construction and of the fundamental fairness of respondent Udall's actions.

Section 9 of the Taylor Grazing Act provides for a hearing whenever an appeal is taken from a determination of a local administrative officer of the Interior Department. The Secretary of Interior has consistently held that this statutory hearing requirement applies to all appeals from initial determinations involving the issuance, denial, reduction, termination and cancellation of grazing permits and licenses. In all such cases of adjudication, an aggrieved party may demand an A.P.A. hearing upon appeal of the decision of the BLM District Manager (*Frank Halls*, 62 I.D. 344 (1955); *E. L. Cord d/b/a El Jiggs Ranch*, 64 I.D. 232 (1957); 43 CFR 161.6(f), 161.9, 161.12(e) and particularly 161.10).

As a necessary step in consummating the North American private land exchange, respondent Udall will act to

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[13] Text of 43 C.F.R. 221.99(d) is as follows:

"In any case, no decision on appeal or in a contest shall be based upon any record, statement file or similar document which is not open to inspection by the parties to the appeal or contest."

terminate petitioners' outstanding grazing license. We submit it is immaterial whether a grazing license is terminated in a proceeding instituted for that purpose or whether termination is an indirect but necessary consequence of implementing the approval of a private exchange application. The action taken and the effect upon the licensee is the same regardless of the type of adjudicatory proceeding involved.[14]

Secondly, due process protections require that a hearing be held before a grazing license is terminated either directly or indirectly.

This Court consistently has held that due process and traditional forms of fair procedures require the granting of a hearing and the opportunity for confrontation and cross-examination before a person can be deprived of his livelihood. This is true even where the Constitution may not inhibit the action, or where Congress has not provided for such procedures. It is particularly the case where a person's work opportunities are seriously limited on the basis of disputed factual determinations rendered in a manner inconsistent with traditional ideas of fair procedure. *Greene* v. *McElroy*, 360 U.S. 474, 507-8 (1959) and cases there cited; *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). Here, petitioners' livelihood, derived in part from statutorily preferred rights, will be wholly destroyed with-

[14] The Court of Appeals seeks to avoid the statutory direction to accord a hearing by a suggestion that in this case there is no local administrative officer "in charge" of private land exchange applications as that term is used in Section 9. But the procedures for adjudicating *applications* for licenses (where Section 9 admittedly requires a hearing) are identical with those for determination of private exchange applications. The statute vests the Secretary of the Interior with the ultimate authority in both cases (Act, Secs. 3, 2 and 8); he in turn has delegated the initial decision in each instance to the Manager of the District Land Office (43 CFR 161.9 and 43 CFR Part 146).

out compensation on the basis of demonstrably erroneous factual determinations which they have been foreclosed from effectively challenging.

Petitioners concede that they possess no such right, title and interest in and to the public domain as would entitle them to just compensation. The due process and just compensation provisions of the Fifth Amendment constitute separate and different safeguards. But the Taylor Grazing Act gives petitioners a right to *use* the public domain for grazing purposes. The courts consistently have held that such grazing rights granted by statute have real value to their possessors; once embodied in licenses they, like more traditional property rights, are the subject of judicial protection against illegal acts. *Red Canyon Sheep Co.* v. *Ickes, supra*, 98 F.2d at 315-16; *McNeil* v. *Seaton, supra*. The majority below wholly ignores these precedents.

Even where the issuance of a license is subject to plenary discretion, ". . . once granted, the license becomes a right and due process of law must be followed to achieve deprivation. This is true even though the license is a severely qualified one, such as a radio license." *In re Carter*, 177 F.2d 75, 78 (D.C.Cir.) *cert. denied*, 338 U.S. 900 (1949). This is particularly the case when the license is the predicate of private investment and the conduct of a business activity. And even if the right granted by a license is limited in time and quality and by its terms is subject to suspension, modification or revocation in the public interest, its impairment, directly or indirectly, constitutes *pro tanto* a deprivation of property. *L. B. Wilson Inc.* v. *FCC*, 170 F.2d 793, 798-802 (D.C.Cir., 1948). See also *Philadelphia Company* v. *SEC*, 175 F.2d 808 (D.C.Cir.), *vacated as moot* 337 U.S. 901 (1949)

Further, the action here challenged will substantially impair the value of petitioners' grazing unit which underlies its outstanding loans. The property rights both of petitioners and lenders in this security will be seriously injured. Moreover, as discussed *infra*, pp. 19-21, Congress in

enacting Section 3 of the Taylor Grazing Act gave express recognition to these various private rights and sought to protect them from administrative invasion. Congress clearly understood that Section 3 gives ranchers a vested right to continue to graze on the public domain when their grazing unit is pledged as security.

An adversary hearing before an independent Examiner with the opportunity of cross-examination is urgently required in view of the numerous factual considerations here at issue, *e.g.*,—the "equal value" of the offered lands as contrasted with the selected lands; the actual use to be made by North American of the selected lands; the alleged incompatibility of North American's use with continued grazing; the contribution of the offered desert lands to a program of range management; the impact of the exchange upon petitioners' ranching operations; the allegedly reduced importance of grazing in the area of the selected lands; the grazing activities which North American has permitted other ranchers to carry on in its fee holdings and which BLM has licensed; the facts surrounding the North American-Stead agreement—wholly ignored by the Secretary—which enables another rancher not so entitled by statute to graze *exclusively* on the selected lands.

Petitioners do not ask this Court to review the evidence underlying the Secretary's factual statements. We merely indicate that numerous factual questions are at issue, and that petitioners' rights can be effectively safeguarded only if they are given access to the administrative file and a hearing with the right of cross-examination.

3. The opinion below raises an important question as to the construction of Section 3 of the Taylor Grazing Act. Petitioners' grazing unit is pledged as security for bona fide loans. Consummation of the North American exchange and termination of petitioners' grazing license will substantially impair the value of this security.

Section 3 of the Act prohibits the Secretary from refusing to renew a grazing license when the value of such security will be impaired. The Secretary can hardly be permitted to by-pass the statutory prohibition and produce the same result by terminating an outstanding license prior to the expiration of its term and the time for renewal. In so acting, he destroys the property rights of both ranchers and lenders in their loan collateral.

Section 3 does constitute a significant limitation upon the Secretary's discretionary power under the statute. But the fact that Section 3 gives ranchers whose units are pledged a vested right to continue grazing was clearly understood and vigorously debated by Congress, both when it enacted the provision [15] and when it subsequently defeated an attempt to revoke this limitation.[16] Moreover, the requirement that the loan be "bona fide" provides the basis for administrative disallowance of fraudulent or abusive arrangements.

The Court of Appeals concluded that extension of a pledge is merely a "factor to be considered" in establishing preference between conflicting applicants for grazing permits. But the governing regulations, in describing the factors to be considered in establishing preference and priority, make no mention of pledges. In 30 years the Secretary has never before treated pledges as a preference factor in adjudicating license applications among competing ranchers. The Court's rationalization is wholly inconsistent with the purpose of the provision to facilitate bank credit by safeguard-

[15] 78 Cong. Rec. 11152-55, 11162, 12004 (1934). See *Hearings*—76th Congress, *supra*, *fn.* 5 at p. 170. (Statement of Senator McCarren.)

[16] See particularly 79 Cong. Rec. 8104, 8107 (1935). A provision to delete Sec. 3 from the Taylor Act, suggested by Secretary Ickes, was inserted by the House in H.R. 3019 after an adverse Committee Report (H.P. Rept. 479, 74th Cong. 1st Sess., p. 9, 79 Cong. Rec. 8103-09). The provision was dropped from the Senate Bill and the final Conference measure. (79 Cong. Rec. 12181, 13769, 14013). The bill itself received a pocket veto.

ing the value as collateral of a grazing unit. The legislative history makes it clear that the Section 3 prohibition is concerned with the pledging of a grazing unit only *after* a selection, on the basis of preference and priority, has been made among competing applicants and grazing rights have been awarded.

4. There is a pressing need now for the court to resolve the issues in dispute. Important recurring questions of statutory construction and administration and constitutional right, basic to ranchers throughout the country, are raised. The decision below is erroneous and hurtful. This is a test case and not a unique case. Administration action on other North American applications and, we believe, other private exchanges, are being held in abeyance pending the outcome here. To defer determination of the issues presented by this case would permit the total and uncompensated destruction in the interm of ranching operations and men's livelihoods.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL PROVISIONS INVOLVED

Article 4, Section 3, Clause 2: The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States: * * *.

Amendment V: * * * nor shall any person * * * be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED

1. The Taylor Grazing Act

AN ACT

To stop injury to the public grazing lands by preventing over-grazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes. Approved June 28, 1934 (48 Stat. 1269), as amended June 26, 1936 (49 Stat. 1976), July 14, 1939 (53 Stat. 1002), July 30, 1947 (61 Stat. 630), August 6, 1947 (61 Stat. 790), June 19, 1948 (62 Stat. 533), and May 28, 1954 (68 Stat. 151).

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That in order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and or to modify the boundaries thereof of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not

in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: PROVIDED, That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. Nothing in this Act shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this Act, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction. Whenever any grazing district is established pursuant to this Act, the Secretary shall grant to owners of land adjacent to such district, upon application of any such owner, such rights-of-way over the lands included in such district for stock-driving purposes as may be necessary for the convenient access by any such owner to marketing facilities or to lands not within such district owned by such person or upon which such person has stockgrazing rights. Neither this Act nor the Act of December 29, 1916 (39 Stat. 862; U.S.C., title 43, secs. 291 and following), commonly known as the "stock Raising Homestead Act," shall be construed as limiting the authority or policy of Congress or the President to include in national forests public lands of the character described in section 24 of the Act of March 3, 1891 (26 Stat. 1103; U.S.C., title 16, sec. 471), as amended, for the purposes set forth in the Act of June 4, 1897 (30 Stat. 35; U.S.C., title 16, sec. 475), or such other purposes as Congress may specify. Before grazing districts are created in any State as herein provided, a hearing shall be held

in the State, after public notice thereof shall have been given, at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held: PROVIDED, HOWEVER, That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry or settlement. Nothing in this Act shall be construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any State, or as vesting in any permittee any right whatsoever to interfere with hunting or fishing within a grazing district. (43 U.S.C., sec. 315)

SEC. 2. The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of the foregoing section, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; and the Secretary of the Interior is authorized to continue the study of erosion and flood control and to perform such work as may be necessary, alone or in cooperation with other agencies, public or private, to protect and rehabilitate the areas subject to the provisions of this Act, through such funds as may be made available for that purpose, and any willful violation of the provisions of this Act or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500. (43 U.S.C., sec. 315a)

SEC. 3. The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time, and in fixing the amount of such fees the Secretary of the Interior shall take into account the extent to which such districts yield public benefits over and above those accruing to the users of the forage resources for livestock purposes. Such fees shall consist of a grazing fee for the use of the range, and a range-improvement fee which, when appropriated by the Congress, shall be available until expended solely for the construction, purchase, or maintenance of range improvement. Grazing permits shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws, and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water, or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten

years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is authorized, in his discretion, to remit, reduce, refund in whole or in part, to authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists: PROVIDED FURTHER, That nothing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the lands. (43 U.S.C., sec. 315b.)"

"SEC. 4. Fences, wells, reservoirs, and other improvements necessary to the care and management of the permitted livestock may be constructed on the public lands within such grazing districts under permit issued by the authority of the Secretary, or under such cooperative arrangement as the Secretary may approve. Permittees shall be required by the Secretary of the Interior to comply with the provisions of law of the State within which the grazing district is located with respect to the cost and maintenance of partition fences. No permit shall be issued which shall entitle the permittee to the use of such improvements constructed and owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements to be determined under rules

and regulations of the Secretary of the Interior. The decision of the Secretary in such cases is to be final and conclusive. (43 U.S.C., sec. 315e)

SEC. 5. The Secretary of the Interior shall permit, under regulations to be prescribed by him, the free grazing within such districts of livestock kept for domestic purposes; and provided that so far as authorized by existing law or laws hereinafter enacted, nothing herein contained shall prevent the use of timber, stone, gravel, clay, coal, and other deposits by miners, prospectors for mineral, bona fide settlers and residents, for firewood, fencing, buildings, mining, prospecting, and domestic purposes within areas subject to the provisions of this Act. (43 U.S.C., sec. 315d)

SEC. 6. Nothing herein contained shall restrict the acquisition, granting, or use of permits or rights-of-way within grazing districts under existing law; or ingress or egress over the public lands in such districts for all proper and lawful purposes; and nothing herein contained shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of such districts under law applicable thereto. (43 U.S.C., sec. 315e)

SEC. 7. The Secretary of the Interior is hereby authorized in his discretion, to examine and classify any lands, withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this Act, or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that

homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: PROVIDED, That locations and entries under the mining laws, including the Act of February 25, 1920, as amended, may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any provision of this Act. Where such lands are located within grazing districts reasonable notice shall be given by the Secretary of the Interior to any grazing permittee of such lands. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: PROVIDED, That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided. (43 U.S.C., sec. 315f)

SEC. 8. (a) Where such action will promote the purposes of a district or facilitate the administration of the public lands, the Secretary is authorized to accept on behalf of the United States any lands within or without the exterior boundaries of a grazing district as a gift.

(b) When public interest will be benefited thereby the Secretary is authorized to accept on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue a patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands.

(c) Upon application of any State to exchange lands within or without the boundaries of a grazing district the Secretary of the Interior shall, and is hereby, directed to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end, but no State shall be permitted to select lieu lands in another State. The Secretary of the Interior shall accept on behalf of the United States title to any State-owned lands within or without the boundaries of a grazing district, and in exchange therefor issue patent to surveyed grazing district land not otherwise reserved or appropriated or unappropriated and unreserved surveyed public land; and in making such exchange the Secretary is authorized to patent to such State, land either of equal value or of equal acreage: PROVIDED, That no State shall select public lands in a grazing district in furtherance of any exchange unless the lands offered by the State in such exchange lie within such grazing district and the selected lands lie in a reasonably compact body which is so located as not to interfere with the administration or value of the remaining land in such district for grazing purposes as set forth in this Act.

When an exchange is based on lands of equal acreage and the selected lands are mineral in character, the patent thereto shall contain a reservation of all minerals to the United States; and in making exchanges of equal acreage the Secretary of the Interior is authorized to accept title to offered lands which are mineral in character, with a mineral reservation to the State.

For the purpose of effecting exchanges based on lands of equal acreage the identification and area of unsurveyed school sections may be determined by protraction or otherwise. The selection by the State of lands in lieu of any such protracted school sections shall be a waiver of all of its right to such sections.

(d) Before any such exchange under this section shall be effected, notice of the contemplated exchange, describing

the lands involved, shall be published by the Secretary of the Interior once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in the same manner in some like newspaper published in any county in which may be situated any lands to be given in such exchange; lands conveyed to the United States under this Act shall, upon acceptance of title, become public lands, and if located within the exterior boundaries of a grazing district they shall become a part of the district within the boundaries of which they are located: Provided, That either party to an exchange based upon equal value under this section may make reservations of minerals, easements, or rights of use. Where reservations are made in lands conveyed either to or by the United States the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary. Where mineral reservations are made by the grantor in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who prospects for or acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon. No fee shall be charged for any exchange of land made under this Act except one half of the cost of publishing notice of a proposed exchange as herein provided. (43 U.S.C., sec. 315g)

SEC. 9. The Secretary of the Interior shall provide, by suitable rules and regulations, for cooperation with local associations of stockmen, State land officials, and official State agencies engaged in conservation or propagation of wildlife interested in the use of the grazing districts. The Secretary of the Interior shall provide by appropriate

rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department. The Secretary of the Interior shall also be empowered to accept contributions toward the administration, protection, and improvement of lands within or without the exterior boundaries of a grazing district, moneys so received to be covered into the Treasury as a special fund, which is hereby appropriated and made available until expended, as the Secretary of the Interior may direct, for payment of expenses incident to said administration, protection, and improvement, and for refunds to depositors of amounts contributed by them in excess of their share of the cost. (43 U.S.C., sec. 315h)

SEC. 10. Except as provided in sections 9 and 11 hereof, all moneys received under the authority of this Act shall be deposited in the Treasury of the United States as miscellaneous receipts, but the following proportions of the moneys so received shall be distributed as follows: (a) 12½ per centum of the moneys collected as grazing fees under section 3 of this Act during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which the grazing districts producing such moneys are situated, to be expended as the State legislature of such State may prescribe for the benefit of the county or counties in which the grazing districts producing such moneys are situated: PROVIDED, That if any grazing district is in more than one State or county, the distributive share to each from the proceeds of said district shall be proportional to its area in said district; (b) 25 per centum of all moneys collected under section 15 of this Act during any fiscal year when appropriated by the Congress, shall be available until expended solely for the construction, purchase, or maintenance of range improvements; and 50 per centum of all moneys collected under section 15 of this Act during any fiscal year shall be paid at the end thereof by the Secretary of the

Treasury to the State in which the lands producing such moneys are located, to be expended as the State legislature of such State may prescribe for the benefit of the county or counties in which the lands producing such moneys are located: PROVIDED, That if any leased tract is in more than one State or county, the distributive share to each from the proceeds of said leased tract shall be proportional to its area in said leased tract. (43 U.S.C., sec. 315i)

SEC. 11. That when appropriated by Congress, 33⅓ per centum of all grazing fees received from each grazing district on Indian lands ceded to the United States for disposition under the public-land laws during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which said lands are situated, to be expended as the State legislature may prescribe for the benefit of public schools and public roads of the county or counties in which such grazing lands are situated. And the remaining 66⅔ per centum of all grazing fees received from such grazing lands shall be deposited to the credit of the Indians pending final disposition under applicable laws, treaties, or agreements. The applicable public-land laws as to said Indian ceded lands within a district created under this Act shall continue in operation, except that each and every application for nonmineral title to said lands in a district created under this Act shall be allowed only if in the opinion of the Secretary of the Interior the land is of the character suited to disposal through the Act under which application is made and such entry and disposal will not affect adversely the best public interest, but no settlement or occupation of such lands shall be permitted until ninety days after allowance of an application. (43 U.S.C., sec. 315j)

SEC. 12. That the Secretary of the Interior is hereby authorized to cooperate with any department of the Government in carrying out the purposes of this Act, and in the coordination of range administration, particularly

where the same stock graze part time in a grazing district, and part time in a national forest or other reservation. (43 U.S.C., sec. 315k)

SEC. 13. That the President of the United States is authorized to reserve by proclamation and place under national-forest administration in any State where national forests may be created or enlarged by Executive order any unappropriated public lands lying within watersheds forming a part of the national forests which, in his opinion, can best be administered in connection with existing national-forest administration units, and to place under the Interior Department administration any lands within national forests, principally valuable for grazing, which, in his opinion, can best be administered under the provisions of this Act: PROVIDED, That such reservations or transfers shall not interfere with legal rights, acquired under any public-land laws so long as such rights are legally maintained. Lands placed under the national-forest administration under the authority of this Act shall be subject to all the laws and regulations relating to national forests, and lands placed under the Interior Department administration shall be subject to all public-land laws and regulations applicable to grazing districts created under authority of this Act. Nothing in this section shall be construed so as to limit the powers of the President (relating to reorganizations in the Executive departments) granted by title 4 of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved March 3, 1933. (43 U.S.C., sec. 315l).

SEC. 14. That section 2455 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 2455. Notwithstanding the provisions of section 2357 of the Revised Statutes (U.S.C., title 43, sec. 678) and of the Act of August 30, 1890 (26 Stat.

391), it shall be lawful for the Secretary of the Interior to order into market and sell at public auction, at the land office of the district in which the land is situated for not less than the appraised value, any isolated or disconnected tract or parcel of the public domain not exceeding one thousand five hundred and twenty acres which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land office of the district in which such land may be situated: PROVIDED, That for a period of not less than thirty days after the highest bid has been received any owner or owners of contiguous land shall have a preference right to buy the offered land at such highest bid price, and where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an equitable division of the land among such applicants, but in no case shall the adjacent land owner or owners be required to pay more than three times the appraised price: PROVIDED FURTHER, That any legal subdivisions of the public land, not exceeding seven hundred and sixty acres, the greater part of which is mountainous or too rough for cultivation, may, in the discretion of the said Secretary, be ordered into the market and sold pursuant to this section upon the application of any person who owns land or holds a valid entry of lands adjoining such tract, regardless of the fact that such tract may not be isolated or disconnected within the meaning of this section: PROVIDED FURTHER, That this section shall not defeat any valid right which has already attached under any pending entry or location. The word 'person' in this section shall be deemed to include corporations, partnerships, and associations." (43 U.S.C., sec. 1171)

SEC. 15. The Secretary of the Interior is further authorized, in his discretion, where vacant, unappropriated, and unreserved lands of the public domain are so situated

as not to justify their inclusion in any grazing district to be established pursuant to this Act, to lease any such lands for grazing purposes, upon such terms and conditions as the Secretary may prescribe: Provided, That preference shall be given to owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands, except that when such isolated or disconnected tracts embrace seven hundred and sixty acres or less, the owners, homesteaders, lessees, or other lawful occupants of lands contiguous thereto or cornering thereon shall have a preference right to lease the whole of such tract, during a period of ninety days after such tract is offered for lease, upon the terms and conditions prescribed by the Secretary: Provided Further, That when public lands are restored from a withdrawal, the Secretary may grant an appropriate preference right for a grazing lease, license, or permit to users of the land for grazing purposes under authority of the agency which had jurisdiction over the lands immediately prior to the time of their restoration. (43 U.S.C., sec. 315m)

Sec. 16. Nothing in this Act shall be construed as restricting the respective States from enforcing any and all statutes enacted for police regulation, nor shall the police power of the respective States be, by this Act, impaired or restricted, and all laws heretofore enacted by the respective States or any thereof, or that may hereafter be enacted as regards public health or public welfare, shall at all times be in full force and effect: Provided, However, That nothing in this section shall be construed as limiting or restricting the power and authority of the United States. (43 U.S.C., sec. 315n)

Sec. 17. Superseded by 1946 Reorganization Plan No. 3, sec. 403, effective July 16, 1946 (11 F.R. 7876, 60 Stat. 1100). (43 U.S.C., sec. 315o)

Sec. 18. (a) In order that the Secretary of the Interior may have the benefit of the fullest information and advice

concerning physical, economic, and other local conditions in the several grazing districts, there shall be an advisory board of local stockmen in each such district, the members of which shall be known as grazing district advisers. Each such board shall consist of not less than five nor more than twelve members, exclusive of wildlife representatives, one such representative to be appointed by the Secretary, in his discretion, to membership on each such board. Except for such wildlife representatives, the names of the members of each district advisory board shall be recommended to the Secretary by the users of the range in that district through an election conducted under rules and regulations prescribed by the Secretary. No grazing district adviser so recommended, however, shall assume office until he has been appointed by the Secretary and has taken an oath of office. The Secretary may, after due notice, remove any grazing district adviser from office if in his opinion such removal would be for the good of the service.

(b) Each district advisory board shall meet at least once annually at a time to be fixed by the Secretary of the Interior, or by such other officer to whom the Secretary may delegate the function of issuing grazing permits, and at such other times as its members may be called by such officer. Each board shall offer advice and make a recommendation on each application for such a grazing permit within its district: PROVIDED, That in no case shall any grazing district adviser participate in any advice or recommendation concerning a permit, or an application therefor, in which he is directly or indirectly interested. Each board shall further offer advice or make recommendations concerning rules and regulations for the administration of this Act, the establishment of grazing districts and the modification of the boundaries thereof the seasons of use and carrying capacity of the range, and any other matters affecting the administration of this Act within the district. Except in a case where in the judgment of the Secretary an emergency shall exist, the Secretary shall request the

advice of the advisory board in advance of the promulgation of any rules and regulations affecting the district. (43 U.S.C., sec. 315o-1)

2. Section 8 of the Taylor Grazing Act, as Originally Enacted (Act of June 28, 1934, c. 865, 48 Stat. 1269, 1272-73)

SEC. 8. That where such action will promote the purposes of the district or facilitate its administration, the Secretary is authorized and directed to accept on behalf of the United States any lands within the exterior boundaries of a district as a gift, or when public interests will be benefited thereby, he is authorized and directed to accept on behalf of the United States title to any privately owned lands within the exterior boundaries of said grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands: *Provided*, That before any such exchange shall be effected, notice of the contemplated exchange, describing the lands involved, shall be published by the Secretary of the Interior once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in the same manner in some like newspaper published in any county in which may be situated any lands to be given in such exchange; lands conveyed to the United States under this Act, shall, upon acceptance of title, become public lands and parts of the grazing district within whose exterior boundaries they are located: *Provided further*, That either party to an exchange may make reservations of minerals, easements, or rights of use, the values of which shall be duly considered in determining the values of the exchanged lands. Where reservations are made in lands conveyed to the United States, the right to enjoy them shall be subject to such reasonable conditions

respecting ingress and egress and the use of the surface of the land as may be deemed necessary by the Secretary of the Interior. Where mineral reservations are made in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the mining and removal of the minerals therefrom and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon. Upon application of any State to exchange lands within or without the boundary of a grazing district the Secretary of the Interior is authorized and directed, in the manner provided for the exchange of privately owned lands in this section, to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end; but no State shall be permitted to select first lands in another State.

3. Act of March 3, 1891, c. 561, § 9, 26 Stat. 1099, 43 U.S.C. 671

No public lands of the United States, except abandoned military or other reservations* isolated and disconnected fractional tracts authorized to be sold by section 1171, and mineral and other lands the sale of which at public auction has been authorized by Acts of Congress of a special nature having local application, shall be sold at public sale.

4. Act of June 1, 1938, c. 317, § 1, 52 Stat. 609, as amended, 43 U.S.C. 682a, "Small Tracts Act"

The Secretary of the Interior, in his discretion, is authorized to sell or lease to any person or organization described in section 682c of this title a tract of not exceeding five acres of any vacant, unreserved public lands, public lands

* A comma should be inserted following the word "reservations."

withdrawn by Executive Orders Numbered 6910 of November 26, 1934, and 6964 of February 5, 1935, for classification, or public lands withdrawn or reserved by the Secretary of the Interior for any purposes, which the Secretary may classify as chiefly valuable for residence, recreation, business, or community site purposes, if he finds that such sale or lease of the lands would not unreasonably interfere with the use of water for grazing purposes nor unduly impair the protection of watershed areas, in reasonably compact form and under such rules and regulations as he may prescribe, at a price to be determined by him, for such use: Provided, That no land may be sold hereunder unless it has been surveyed. No person or organization shall be permitted to purchase or lease more than one tract under the provisions of sections 682a-682c of this title, except upon a showing of good faith and reasons satisfactory to the Secretary.

5. Act July 9, 1942 (56 Stat. 654) as amended May 28, 1948, 62 Stat. 277, 43 U.S.C. 315q

That whenever use for war or national defense purposes of the public domain or other property owned by or under the control of the United States prevents its use for grazing, persons holding grazing permits or licenses and persons whose grazing permits or licenses have been or will be cancelled because of such use shall be paid out of the funds appropriated or allocated for such project such amounts as the head of the department or agency so using the lands shall determine to be fair and reasonable for the losses suffered by such persons as a result of the use of such lands for war or national defense purposes. Such payments shall be deemed payment in full for such losses. Nothing herein contained shall be construed to create any liability not now existing against the United States.

6. Pub. L. 85-337, § 2, 72 Stat. 28, February 28, 1958, 43 U.S.C. 156

No public land, water, or land and water area shall, except by Act of Congress, on and after February 28, 1958, be (1) withdrawn from settlement, location, sale or entry for the use of the Department of Defense for defense purposes; (2) reserved for such use; or (3) restricted from operation of the mineral leasing provisions of the Outer Continental Shelf Lands Act, if such withdrawal, reservation, or restriction would result in the withdrawal, reservation, or restriction of more than five thousand acres in the aggregate for any one defense project or facility of the Department of Defense since the date of enactment of this Act or since the last previous Act of Congress which withdrew, reserved, or restricted public land, waters or land and water area for that project or facility, whichever is later.

APPENDIX B

Opinions and Judgment Below

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,711

W. DALTON LARUE, SR., et al., APPELLANTS

v.

STEWART L. UDALL, individually and as Secretary of the Interior,

and

NORTH AMERICAN AVIATION, INC., APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided October 3, 1963

Mr. David Ginsburg, with whom *Mr. Leonard N. Bebchick* was on the brief, for appellant.

Mr. Edmund B. Clark, Attorney, Department of Justice, with whom *Assistant Attorney General Clark*, *Messrs. Roger P. Marquis* and *Thomas L. McKevitt*, Attorneys, Department of Justice, were on the brief, for appellee Udall.

Mr. Charles Pickett, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Warren E. Baker* was on the brief, for appellee North American Aviation, Inc. *Mr. Joseph F. Healy, Jr.*,

also entered an appearance for appellee North American Aviation, Inc.

Before BAZELON, *Chief Judge*, and WILBUR K. MILLER and BURGER, *Circuit Judges*.

WILBUR K. MILLER, *Circuit Judge*: The appellants operate a cattle ranch located within the boundaries of Carson City Grazing District No. 3, Nevada. They own in fee about 1,600 acres in five non-contiguous tracts, and are licensed to graze their cattle on approximately 10,000 acres of public land. Due to the railroad grants of the Nineteenth Century, the area is made up of both publicly and privately owned tracts in a checkerboard pattern.

Appellee North American Aviation, Inc., is a large corporation engaged in the development and manufacture of rocket engines and rocket power plants and in research in that field. Having progressed to the point where it needed a very large body of land in an isolated area for the development of its program, North American acquired title to a considerable portion of the privately owned lands in the portion of Carson City Grazing District No. 3 heretofore utilized by the appellants. In order to complete its project, North American needed to acquire the large acreage of public lands under grazing license to the appellants.

In exchange for this portion of Carson City Grazing District No. 3, which has an appraised value of $86,400, North American offered the United States more than 20,000 acres lying within the boundaries of Winnemucca Grazing District No. 2, Nevada, which has an appraised value of $90,100. This land is a substantial distance from the land North American desired to obtain.

The appellants protested that the exclusion of their cattle from the area sought by North American would seriously curtail, if not destroy, their ranching operation, as the lands owned by them in fee will not sustain it; and they

asserted that § 8(b) of the Taylor Grazing Act[1] which authorizes the Secretary of the Interior in some circumstances to make such exchanges does not authorize the exchange proposed by North American. Arguments pro and con on appellants' protest, including affidavits and memoranda of law, were considered by the lower echelons of the Department and finally the matter reached the Secretary of the Interior. In a somewhat lengthy opinion, in which he discussed the matter in detail, the Secretary approved the exchange.

Thereupon, the appellants complained to the United States District Court for the District of Columbia, challenging the legality of the exchange so approved. The District Court having affirmed the Secretary's decision, the appellants brought this appeal.

They contend that § 8(b) of the Taylor Grazing Act does not authorize the Secretary of the Interior to issue a patent for public grazing land to a private organization for industrial use, even for national defense purposes, especially when his act in so doing will terminate a grazing license and destroy a ranching operation. Their principal argument is that § 8(b) authorizes the exchange of publicly owned grazing lands for privately owned lands only when the public interests in grazing on the public range and in conservation will be benefited thereby.[2] That North

[1] That section, which is 43 U. S. C. §315g(b), is as follows:

"(b) When public interests will be benefited thereby the Secretary is authorized to accept on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands."

[2] Appellants point out that a former Solicitor of the Department of the Interior took this view of the section and that, in this case, the Associate Director of the Bureau of Land Management so interpreted it.

American will not use the lands for grazing or conservation purposes is not disputed.

The term "public interests" in § 8(b) is not defined by that section, nor is it limited or restricted in any way. If Congress had intended to restrict the meaning of those words in the manner urged by the appellants, we think it would have said so. Such a qualification could easily have been inserted in the statute. It seems to us that the Secretary correctly construed § 8(b) when he said in his opinion:

> " . . . [T]he benefit to the public interests, which is the criterion of the statute, need not be related exclusively to conservation of Federal grazing resources nor need it be shown that a proposed exchange will promote range management. . . . [T]he Taylor Grazing Act is a multiple purpose act and while its chief immediate purpose was to stop injury to the public domain by unregulated grazing and to promote the stabilization of the livestock industry, section 1 of the act authorizes the Secretary of the Interior to establish grazing districts in order to promote the highest use of the public domain 'pending its final disposal.' Section 3 authorizes the Secretary to issue permits to graze livestock on such grazing districts but provides that the issuance of such permits shall not create any right, title, interest, or estate in or to the lands. Section 7, as amended by the act of June 26, 1936, authorizes the Secretary to examine and classify lands within grazing districts and to open such of those lands as he finds to be more valuable or suitable for other purposes than grazing or proper for acquisition in satisfaction of outstanding rights to disposition under applicable public land laws, after reasonable notice has been given to grazing permittees. Section 14 of the act (43 U. S. C., 1958 ed., sec. 1171) authorizes the Secretary to order into market and sell at public auction isolated or disconnected tracts of the public domain and tracts which are mountainous and too rough for cultivation.

"Thus nothing in the other sections of the act suggest that private interests may not acquire public land being used for grazing purposes to the detriment of those licensed to use the land."

We observe, moreover, that § 8(b) expressly authorizes the Secretary to exchange surveyed public land for privately owned land outside a grazing district. It is also true, as the Secretary's opinion pointed out, that North American's acquisition of large acreage of privately owned land in the area of the selected land has reduced the importance of grazing in the area.

Even under appellants' restricted view of the meaning of the statutory words "public interests," it is clearly the Secretary's duty, in considering a proposed exchange, to consider its net result: to compare the advantages which the offered land would bring to conservation and the grazing industry with any disadvantage to those interests which might result to them from the withdrawal of the selected lands from a grazing district. This the Secretary seems to have done, as he held "that acquisition of the offered lands would block out holdings of public lands and would facilitate the administration and management of the area for grazing purposes." Thus appellee Udall gave another reason for approving the exchange in addition to his interpretation of § 8(b). We think he was right in both respects.

Appellants also assert that their grazing unit has been and is pledged as security for *bona fide* loans, and that therefore the Secretary may not terminate their grazing permit. As a basis for the assertion they rely upon the language we have italicized in the following portion of § 3 of the Taylor Grazing Act (43 U. S. C. § 315b):

" . . . Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water

rights, as may be necessary to permit the proper use of lands, water, or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that *no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. . . .*"

Their contention is that if the Secretary may not refuse to renew a permit when the permittee's grazing unit is pledged as security for a *bona fide* loan, "he can hardly bring about the same result indirectly, by terminating a permit prior to the expiration of the term . . . ." As the context shows, the provision relied upon by the appellants is one of the factors to be considered by the Secretary in establishing preferences between conflicting applications for permits on the federal range. By no means should it be construed as providing that, by maintaining a lien on his grazing unit, a permittee may also create and maintain a vested interest therein which will prevent the United States from exchanging it under § 8(b).

Another point on appeal is thus stated by the appellants:

> "Appellee Udall acted unlawfully and deprived appellants of due process (a) by denying a full and fair hearing in derogation both of the provisions of the Taylor Grazing Act and the Fifth Amendment; (b) by denying access to the full record on which appellee Udall's decision was based; and (c) by denying appellants the protection afforded by the Administrative Procedure Act."

As appellants were heard at length on their protest against the proposed exchange, it is apparent their real complaint is that no formal evidentiary hearing was held. We find nothing in the Taylor Grazing Act which requires a hearing on such a protest. Section 8, dealing with exchanges, merely requires publication of notice of a contemplated exchange. Where Congress intended a hearing to be held, it provided therefor in express terms, as it did in § 1 of the Taylor Grazing Act (43 U. S. C. § 315):

> " . . . Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given, at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held . . . ."

Section 9 of the Act (43 U. S. C. § 315h) does provide for "local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department." We think the provision does not apply to applications for exchange under § 8(b), a matter in which no local administrative officer is "in charge," but only to matters that arise in the administration of grazing districts.

Appellants' reliance on the Fifth Amendment disregards the provision of § 3 of the Act (43 U. S. C. § 315b) that

> " . . . So far as consistent with the purposes and provisions of this chapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this chapter shall not create any right, title, interest, or estate in or to the lands."

The command of Congress that grazing privileges shall be adequately safeguarded "so far as consistent with the purposes and provisions of this chapter" does not mean that a grazing permit is to prevent the Government's exercise of the right of exchange, which is "one of the provisions of this chapter."

The Administrative Procedure Act does not require a hearing here, as § 5 of that measure (5 U. S. C. § 1004) applies only to agency action which the agency statute provides must be preceded by a hearing. *Springfield Airport Authority* v. *C. A. B.*, 109 U. S. App. D. C. 197, 198 n. 1, 285 F. (2d) 277, 278 n. 1 (1960).

We have carefully considered all the other contentions made by the appellants, but do not find in them any reason for disturbing the Secretary's decision. As we said in *Safarik* v. *Udall*:[3]

> "It is obvious that the Secretary of the Interior in carrying out his functions in the administration and management of the public lands, must be accorded a wide area of discretion and it is a well-recognized rule that administrative action taken by him will not be disturbed by a court unless it is clearly wrong."

Instead of being clearly wrong, the Secretary's action seems to us to have been quite correct. The District Court's judgment upholding his decision will be affirmed.

It is so ordered.

BAZELON, *Circuit Judge*, concurring: Under § 8(b) of the Taylor Grazing Act, 43 U.S.C. § 315g(b) (1958), any landowner may propose to exchange his land ["offered" lands]

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[3] 113 U. S. App. D. C. 68, 74, 304 F. (2d) 944, 950, *cert. denied sub nom.* Hansen v. Udall, 371 U. S. 901 (1962).

for federal land of equal value located within a grazing district ["selected" lands]; and the Secretary of the Interior may approve the exchange if "public interests will be benefited thereby." In this case, because the Secretary viewed the Taylor Act as a "multiple purpose" statute, he construed the term "public interests" as a broad reference to the general public interest, rather than being limited to grazing interests. In approving the exchange, the Secretary relied heavily on his finding that the exchange would benefit the general public interest, but he also found that the exchange would benefit grazing interests.[1] This court holds that the exchange may be approved on either ground. I think approval can rest only on a finding of benefit to grazing interests.

The Taylor Grazing Act of 1934[2] closed the public domain, climaxing the reversal of earlier policy which had encouraged disposal of the public lands to private ownership.[3] The policy of land conservation—retaining federal ownership and regulating land use to prevent depletion of natural resources—began with the creation of forest reserves after 1891.[4] The Taylor Act extended this policy to

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[1] The Secretary's finding of grazing benefit appears from his statements that the importance of grazing in the area of the selected lands has lessened in recent years, and that "acquisition of the offered lands would block out holdings of public lands and would facilitate the administration and management of the area for grazing purposes." *W. Dalton LaRue, Sr.*, A-29309 (1962).

[2] Act of June 28, 1934, 48 Stat. 1269 (1934), as amended, 43 U.S.C. §§ 315, 315a-315r (1958).

[3] See, *e.g.*, *Hearings on H.R. 6462 Before the Senate Committee on Public Lands and Surveys*, 73d Cong., 2d Sess. 46 (1934) (statement by Senator O'Mahoney of Wyoming). See ROBBINS, OUR LANDED HERITAGE 285-423, especially 421-23 (1950); PEFFER, THE CLOSING OF THE PUBLIC DOMAIN 5, 8-231, 302-41 (1951); CLAWSON & HELD, THE FEDERAL LANDS 15-36 (1957) (Marion Clawson was Director of the Bureau of Land Management in 1948-53).

[4] 26 Stat. 1103 (1891), as amended, 16 U.S.C. § 471 (1958).

the remaining 173,000,000 acres of public lands still unreserved by 1934. To prevent soil deterioration and stabilize the livestock industry which constituted the chief user of this public range,[5] the Secretary of the Interior was authorized to reserve suitable lands for the creation of grazing districts and to regulate grazing within the districts by issuing permits.[6] It was recognized however, that the existing checkerboard pattern of alternating public and private ownership, resulting from the course of land settlement during the nineteenth century,[7] would make it difficult to administer the districts efficiently.[8] To meet this problem, § 8 of the Act was designed to foster consolidation in the manner of earlier forest reserves legislation:[9] the Secretary was authorized to accept land which would consoli-

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[5] See S. Rep. No. 1182, 73d Cong., 2d Sess. (1934); H.R. Rep. No. 903, 73d Cong., 2d Sess. (1934); 78 Cong. Rec. 6346, 6364-65 (1934). See also Ickes, *The National Domain and the New Deal*, Saturday Evening Post Dec. 23, 1933, p. 10.

[6] Section 1 of the Act originally limited the total amount of land which could be included in grazing districts to 80,000,000 acres. This limitation, inserted to curb the power of the Secretary, 78 Cong. Rec. 11140 (1934), was shortly abandoned in order to allow maximum application of the Taylor Act's policies. 49 Stat. 1976 (1936); 68 Stat. 151 (1954); see 80 Cong. Rec. 3815-16 (1936). Today there are 161,000,000 acres of federal land in 58 grazing districts. Bureau of Land Management, Public Land Statistics, Table 81 (1962).

[7] Behind the checkerboard pattern is the familiar history of free land entry, railroad land grants, and school land cessions to the States. See Hibbard, *Land Grants*, 9 Encyc. Soc. Sci. 32 (1937).

[8] H.R. Rep. No. 903, 73d Cong., 2d Sess. 3, 7 (1934). See Clawson & Held 48-50.

[9] 42 Stat. 465 (1922), 16 U.S.C. § 485 (1958); 43 Stat. 1215 (1925), 16 U.S.C. § 516 (1958). See also 16 U.S.C. §§ 486a-486w (1958).

date the grazing districts, either by gift or in exchange for other grazing land of equal value.[10]

The legislative history of the Act shows that in authorizing the Secretary to convey public lands to private individuals as part of an exchange, § 8(b) was intended not as a new source of power to alienate federal lands, but simply to promote consolidation of the grazing districts.[11] As such, I think that the determination that "public interests will be benefited [by an exchange]" includes only public interests in furtherance of the grazing and range stabilization policies which are the subject of the Act. The term was so construed in an opinion rendered by the Solicitor of the Department of the Interior shortly after the Act's passage,[12] and there is no basis for the Secretary's suggestion

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[10] Section 8, Act of June 28, 1934, 48 Stat. 1272, (1934), as amended, 43 U.S.C. § 315g (1958):

"(a) *Where such action will promote the purposes of a district or facilitate the administration of the public lands*, the Secretary is authorized to accept on behalf of the United States any land within or without the exterior boundaries of a grazing district as a gift.

"(b) *When public interests will be benefited thereby* the Secretary is authorized to accept on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land: . . .

"(c) Upon application of any State to exchange lands within or without the boundaries of a grazing district the Secretary of the Interior shall, and is directed to proceed with such exchange at the earliest practicable date: . . . ." [Emphasis supplied.]

[11] See 78 CONG. REC. 6359 (1934); *Senate Hearings on H.R. 6462, supra* note 3, at 94-100. In the Hearings, Representative Taylor said:

"But I would like to say that under this bill it is not intended to make a general exchange arrangement outside, where they [the lands] have nothing to do with this bill." *Id.* at 98.

[12] *Land exchange with States under Taylor Grazing Act*, 55 I.D. 9 (1934).

that amendments since 1934 have changed the meaning of § 8.[13]

The Secretary argues that where Congress wished to consider only grazing interests, it said so. For this proposition, he cites § 8(a), dealing with the acceptance of gift lands, which requires the specific showing that the acquisition will "promote the purposes of a district or facilitate the administration of the public lands." But I do not think the more general language in § 8(b) was intended to allow the Secretary to go beyond grazing interests for his standards. Rather, it indicates that in an exchange of lands, there will be more than one factor to consider under the heading of grazing interests. Thus where the Government is conveying land as well as procuring land, it must consider the effect of the transaction not only on administration of the grazing district of the offered land, but also its effect on administration of the grazing district of the selected land and on the interests of grazing licensees of the land to be conveyed.[14] While offered land might meet the

[13] The only major change was a 1936 amendment eliminating an ambiguity in regard to State exchanges. 49 Stat. 1976 (1936); see *Hearings on S. 2359 Before the Senate Committee on Public Lands and Surveys*, 74th Cong., 1st Sess. 47-78 (1935). Sections 8(a) and 8(b) have been amended to permit the Secretary to accept land situated outside the boundaries of a grazing district. 49 Stat. 1976 (1936); 62 Stat. 533 (1948). But it appears that these amendments were for the limited purpose of acquiring land needed for stock driveways adjacent to grazing districts. *Cf.* S. Rep. No. 1497, 80th Cong., 2d Sess. (1948).

[14] Although § 3, 43 U.S.C. § 315b (1958), provides that issuance of a grazing permit shall not create any vested right, it also states that "so far as consistent with the purposes and provisions of this chapter, grazing privileges recognized and acknowledged shall be adequately safeguarded." See *Oman v. United States*, 179 F. 2d 738 (10th Cir. 1949); *Red Canyon Sheep Co. v. Ickes*, 69 App. D.C. 27, 98 F. 2d 308 (1938). Thus, while the existence of an outstanding permit does not preclude an exchange, it is a relevant consideration.

required standards, the detriment involved in giving up the selected lands might outweigh the benefit. In *Willis N. Farlow*, 62 I.D. 206 (1955), a proposed exchange of lands equally valuable for grazing was disapproved because of the detrimental effect on two ranchers.

This court agrees with the Secretary that private interests may acquire public grazing land to the detriment of grazing licensees.[15] I also agree. But that does not answer the question in this case. The question here is whether or not such an acquisition *under the exchange provisions of § 8(b)* requires a determination that the net effect of the exchange will benefit public grazing interests. I think this determination is required, and that the grazing value of the offered land is a critical consideration.[16]

A contrary conclusion would be inconsistent with the over-all congressional policy sharply limiting the Secretary's authority to remove land from public ownership.

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[15] Section 3 of the Act requires the Secretary to renew permits where the grazing unit covered is pledged as security for a bona fide loan. The purpose of this provision was to encourage bank credit, see *Hearings on S. 2359 Before the Senate Committee on Public Lands and Surveys*, 74th Cong., 1st Sess. 37-39 (1935); 78 CONG. REC. 11151-55, 11162 (1934), but there was no indication that it was intended to limit the Secretary's power to consolidate districts by land exchange.

[16] Appellees cite two exchanges approved by the Secretary under § 8(b) to show that offered lands need not be valuable for grazing. In *Elbert O. Jensen*, 60 I.D. 231 (1948), the exchange was approved, although the offered land was situated within a national forest, and not under the jurisdiction of the Taylor Act. But that case is distinguishable because similar land conservation policies underlie the creation and administration of the forest reserves and the grazing districts, and because grazing is one of the major issues of forest lands. See CLAWSON & HELD 57-60, 200. See also 76 Stat. 140 (1962), 43 U.S.C. § 315g-1 (Supp. IV 1959-1962); H.R. REP. No. 1418, 87th Cong., 2d Sess. (1962). In *Owen Ault*, A-27845, which was not appealed, the Secretary based his approval of a proposed exchange on national defense interests. I think he erred.

Since 1891, when general alienation of public land was forbidden, land sales have been permitted only by specific legislation.[17] Such legislation is presently limited to a handful of special-purpose statutes, none of which authorizes the sale of land in excess of 1520 acres in a single transaction.[18] The Secretary here claims a grant of authority under § 8(b) which greatly exceeds that under any other public land law.

The Taylor Act reflects Congress' determination to limit the Secretary's power.[19] This purpose was reconfirmed as recently as 1958 by the legislative reaction to administrative claims—based on national defense needs—to greater authority over the public lands. Following a report criticizing excessive land demands by the military departments,[20] Congress amended existing legislation authorizing reservation of land for military purposes[21] to require specific congressional authority for each reservation exceeding 5,000 acres.[22] The purpose of the amendment, as described in the Senate Committee Report, was:

> to return from the executive branch to the Congress—to the extent that [public] lands are involved—the responsibility imposed by the Constitution on the Congress for their management.[23]

Nevertheless, in the present case, appellees argue that the special importance of national defense justifies a broad

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[17] 26 Stat. 1099 (1891), 43 U.S.C. § 671 (1958).

[18] The major provisions are at 43 U.S.C. §§ 321-39, 351-60, 682a-682e, 1171-77 (1958). See summary in CLAWSON & HELD 391-92.

[19] See, *e.g.*, 78 CONG. REC. 11140-43 (1934).

[20] S. REP. No. 857, 85th Cong., 1st Sess. (1957). See also H.R. REP. No. 2856, 84th Cong., 2d Sess. (1956).

[21] 10 U.S.C. § 2667 (1958).

[22] 72 Stat. 27 (1958), 43 U.S.C. §§ 155-158 (1958).

[23] S. REP. No. 857, 85th Cong., 1st Sess. 3 (1957).

reading of § 8(b). But Congress has provided a method for making land—including grazing land—available for national defense. Under § 7 of the Taylor Act, land found "more valuable or suitable for any other use" than grazing may be reclassified and opened for "disposal in accordance with such classification under applicable public-land laws."[24] And 10 U.S.C. § 2667 (1958) authorizes a private lease "whenever the Secretary of a military department considers it advantageous to the United States." This procedure, although not as expeditious as a § 8(b) exchange,[25] is the one fixed by Congress for accommodating national defense interests.

The decrease in grazing since 1934,[26] together with the growing importance of Western commercial and industrial development, may indicate that the Taylor Act's emphasis on grazing is outdated. But Congress has not said so, nor has Congress relaxed its concern with land conservation and retention of federal ownership.[27] If changed circumstances require a view of "public interests" under § 8(b) that goes beyond grazing interests, Congress—not the Secretary—must say so.[28]

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[24] 43 U.S.C. § 315f (1958).

[25] Since the selected land in this case exceeds 5000 acres, specific congressional approval would be required. See note 22 *supra*. In addition, North American Aviation would not gain fee title to the land, and holders of grazing licenses would be entitled to compensation for the destruction of their licenses. 56 Stat. 654 (1942), as amended, 43 U.S.C. § 315q (1958).

[26] See CLAWSON & HELD 335.

[27] See INT. DEPT. ANN. REP. (1962): *New Horizons in Resource Conservation*, IX-LXXVI, especially XLVI-L. See also CLAWSON & HELD 346-47.

[28] Congress considered legislation on the subject in 1963. See S. 601, S. 1598, S. 1599, S. 1600, S. 1601, and S. 1602, 88th Cong., 1st Sess. (1963). See also SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 88TH CONG., 1ST SESS., THE PUBLIC LANDS (Comm. Print 1963).

Judgment

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the Court that appellee North American Aviation, Inc., recover from appellants its taxable costs on this appeal, and have execution therefor.

Per Circuit Judge WILBUR K. MILLER

Dated: Oct. 3, 1963

Separate concurring opinion by Chief Judge Bazelon.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 653

W. DALTON LARUE, SR. and JUANITA S. LARUE,

Petitioners,

v.

STEWART L. UDALL, individually and as Secretary of the Interior,

and

NORTH AMERICAN AVIATION, INC.,

Respondents.

BRIEF OF RESPONDENT NORTH AMERICAN AVIATION, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

No important question arises in this case.

At issue is one particular exchange of land between the United States and North American Aviation, Inc. The Government would get nearly twice as much land as it would give, and greater dollar value. Undesirable checkerboard areas in two grazing districts would be eliminated. Grazing interests and national defense would benefit.

The Secretary of the Interior may make an exchange when "public interests will be benefited thereby" (48 Stat. 1272, as amended; 43 U. S. C. A. (315g(b)).* The Secretary, like all lower echelons of his Department, found this exchange would benefit public interests. All the judges below voted to sustain his conclusion. No reason exists for this Court to review the case.

COUNTER-STATEMENT OF THE CASE

Since petitioners often are at odds with the facts, a counter-statement is needed.

The Offered Lands

Typically, petitioners disparage (Pet. p. 4) the grazing utility of the "offered lands," *i.e.*, the lands the Government will receive by the exchange.

Those lands—comprising 20,763.48 acres in a grazing district in Nevada (131, 142-143)—are located "in an area where grazing is and will continue to be the principal land use for many years" (54).**

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*Hereafter we shall call respondent Udall "the Secretary," respondent North American Aviation, Inc. "North American" and the Taylor Grazing Act (Act of June 28, 1934, c. 865, 48 Stat. 1269, as amended; 43 U. S. C. §§315ff.) "the Act." Appendix B contains Chapter 8A of United States Code Annotated, volume 43, which includes the present Act, and also the original 1934 Act.

**Numbers in parentheses refer to pages of the Joint Appendix in the Court of Appeals, unless the context shows otherwise.

Italics are ours unless otherwise stated.

Grazing on the offered lands goes back to about 1880 (143). Petitioners themselves submitted an affidavit wherein a rancher swore in December 1961 that "he has grazed livestock on the offered land . . . since 1938" (127).

The experienced Land Examiner (134-135) twice stated that grazing was the highest use (apart from speculation) to which the offered lands could be put (145, 167). He valued them at $90,100 and the "selected lands" (*i.e.*, the Government land that would be exchanged) at $86,400 (134, 166). The Secretary accepted those figures (22).

The Undesirable Checkerboard Pattern in the Area of the Offered Lands

Land has a "checkerboard" pattern when different persons own alternate holdings. Checkerboard ownership impedes development of the land and is undesirable (107-108, 137).

Here "both the offered lands and the selected lands are within checkerboard pattern land areas" (137).

The "lands surrounding the offered lands are by and large public domain lands" (142). The exchange would eliminate an undesirable checkerboard in the area of the offered lands by consolidating ownership in the Government.

Recommending the exchange, the local District Manager stated "it would be very desirable to acquire" the offered lands "under Federal ownership to eliminate the very complex land pattern" (169).

The Undesirable Checkerboard Pattern in the Area of the Selected Lands

The selected lands total 10,807.41 acres in a different grazing district in another Nevada county (131, 150-151). They lie in "rough, rolling and mountainous" terrain which is "rough as cow country goes" although "used as spring and summer cattle range" (157).

In the area of the selected lands, North American property now largely surrounds the Government's checkerboard sections (152, 158). The checkerboard pattern has long had an adverse effect there (53). The exchange would eliminate a large checkerboard in that area by consolidating ownership in North American (152, 158).

Recommending the exchange, the local District Manager noted that disposition of the checkerboard would have "beneficial effects" to the district by "blocking of an area into solid government land . . . giving easier and better control over the Federal range already in the area" (175).

The National Defense Benefits of the Exchange

North American does a vast amount of rocket engine work of great importance to national defense (88, 102-103). Advances in rocket engines require isolated test sites that are hard to find (84-85, 103-106). Years ago, when its original test site was already becoming crowded, North American chose the area of the selected lands for a new test site (85, 106-107, 222).

In 1956, North American began to acquire property in that area (85, 107). To prevent hostile control of extensive

acreage lying to the south; it also obtained the very valuable right of first refusal over certain other holdings (33-34, 110, 218).*

While the exchange hangs fire, the gradual conversion of North American's property in the area to rocket engine work (112-113, 117-118, 198-199, 222) has been hampered and its cost increased unduly (113, 118, 218). The exchange would provide a consolidated tract enabling North American to go forward with vital defense work (113-114).

The Diminished Importance of Grazing in the Area of the Selected Lands

The Secretary found that, "as the manager stated, the importance of grazing in the selected area has been reduced. This is so whether or not the exchange is approved" (30).**

Although petitioners quarrel with some of the Secretary's language (Pet. p. 15, n. 12), the sense was plain.***

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* Without that vital right, North American would not have undertaken any activity in the area (110, 218). In exchange, North American agreed *inter alia* to exclude everyone except one of the owners from grazing on its land in the area, reserving the right to exclude him too by fencing off the property (34), which would not involve great expense (110). This enabled North American to decide whether its land should be used transitionally for grazing during its progressive conversion to defense work (110).

** The local District Manager had stated: "The selected lands are located in an area where grazing is becoming less important with the passage of time" (53).

*** North American had acquired nearly all the privately owned land in the area (26), which it could refuse to lease to livestock operators. Since land devoted to defense installations cannot be used for grazing, its use for defense purposes took it out of the category of grazing land. Grazing was therefore less important in the area than formerly (30).

The court below sustained his finding (*infra*, pp. A5, A9 n. 1).

Grazing in the area will continue to diminish as more land is fenced off for defense installations (110, 117, 118-119, 221-222).

Petitioners' Operations

While the exchange would adversely affect petitioners' cattle operations (174), talk about "irreparable damage" and "uncompensated destruction" of "men's livelihoods" (*e.g.*, Pet. pp. 4, 8, 17, 21) is unwarranted.

Petitioners—a Reno accountant and his wife (115, 220)—acquired in 1953 and own five noncontiguous parcels totalling 1,562.27 acres in the area of the selected lands (3, 120). Under "temporary and revocable" annual permits (237), they may graze not over 206 cattle on Government land in the area (122).

After assuming a deed of trust on the realty (181), petitioners borrowed money secured by a chattel mortgage but paid it off (194-197, 210). Two years after North American's exchange application was filed (120), they placed a later chattel mortgage on the ranch personalty (121).

The ranch appears to be marginal (122). Far from their livelihood depending on it, petitioners do not allege they ever made a profit from it (220). Yet they have rejected North American's offers to pay a sum many times its assessed value (109, 120, 218-219), or its fair value fixed impartially (111-112, 199-200, 219, 225-226).

The Proceedings in the Department of the Interior

Petitioners were heard at length in the Department of the Interior, though no trial-type hearing was held. During the various departmental proceedings, they submitted six briefs, seven affidavits and one other exhibit (38-45, 69-83, 125-128). They chose not to seek oral argument (128).

No basis exists for saying the Secretary "based his action" on material to which petitioners were denied access (Pet. p. 6, 16).*

The Secretary's Decision

Both the Nevada Land Office (50-51, 52-58) and the Associate Director, Bureau of Land Management (59-66) concluded the exchange would benefit public interests. They also agreed it would benefit grazing interests (53-54, 62-63). They differed, however, on whether national defense interests could be considered too (55, 63).

On that point, the Secretary said "nothing in the statutory provision prevents the Department from looking at the advantages to be gained by the public generally . . ." (30). He noted that "the importance of grazing in the selected area has been reduced" (30). "Therefore, taking into account *all* of the factors surrounding the proposed exchange, I am of the opinion that even if there were no advantage to acquisition of the offered land, this exchange

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* Petitioners were given access to everything in the file except "intra-Bureau" memoranda determined by the Associate Director to be "privileged material, the contents of which properly could not be disclosed. *We recognize that such memoranda cannot be used as a basis for a decision in the La Rue protest*" (187).

is within the contemplation of the statutory provision . . ." (30-31).

The Secretary did not stop there. He then discussed a prior policy statement contemplating "compelling reasons to acquire the offered lands to augment long-range Federal Resource Management programs," and found the exchange would benefit grazing interests (31):

> "It appears in this case that *acquisition of the offered lands would block out holdings of public lands and would facilitate the administration and management of the area for grazing purposes. This is clearly beneficial to the public interest* but whether a compelling reason exists, in terms of the policy statement, for acquiring the offered lands may be subject to debate."

Correctly deciding (as was conceded below) the policy statement was no "straitjacket," the Secretary concluded: "The material before me establishes without much question that consummation of the proposed exchange would be in the public interest" (31).

The Proceedings Below

Petitioners sued to enjoin the Secretary from making the exchange. Over petitioners' opposition, North American was allowed to intervene (1).

Both the Secretary and petitioners moved for summary judgment. Granting the Secretary's motion without opinion, Judge Matthews dismissed the complaint (239).

All three judges in the Court of Appeals agreed on affirmance. Judge Miller wrote an opinion in which Judge Burger concurred (*infra*, pp. A2-A8); Judge Bazelon wrote a concurring opinion (*infra*, pp. A9-A16).*

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

None of the broad questions posed (Pet. p. 2) is really involved. The narrow questions that actually exist do not merit review by this Court.

I.

No Question Herein Under Section 8(b) of the Act Merits Review by This Court

A. The Non-Existent Questions Posed Under Section 8(b)

Petitioners say the "critical issue raised by this case" is whether section 8(b) of the Act gives the Secretary "virtually unfettered discretionary authority to make wholesale dispositions of the public domain to private parties for private purposes" (Pet. p. 8). No such issue arises here.

---

* Judge Bazelon summed up the sole difference in the court as follows: "In approving the exchange, the Secretary relied heavily on his finding that the exchange would benefit the general public interest, but he also found that the exchange would benefit grazing interests. This court holds that the exchange may be approved on either ground. I think approval can rest only on a finding of benefit to grazing interests" (*infra*, p. A9).

1. No Question Arises About "Wholesale Dispositions" of the Public Domain

This case involves only a land exchange—not all "dispositions" of the public domain. Dispositions are of many diverse kinds. Gifts, for instance, provide no *quid pro quo* to the United States. Sales do, but deplete the Government's landholdings. In exchanges, however, the offered lands replace the selected lands.

Understandably, Congress has varied the Secretary's authority depending on the type of disposition involved. It is a fallacy, therefore, to lump all "dispositions" together indiscriminately.

Nevertheless, petitioners emphasize that Congress has not yet given the Secretary *new* power *to sell* lands (Pet. pp. 7, 12-13). But that does not affect his *existing* power to *exchange* lands. Sales cannot be equated with exchanges. Existing statutory authority is not negatived by Congress' failure to pass another law expressly conferring it—much less its failure to grant some different authority.*

2. No Question Arises About Exchanges to Benefit "Private Purposes"

Nor does this case raise the question whether the Act authorizes exchanges for "private purposes" (Pet. p. 8) or "private industrial purposes" (Pet. p. 2).

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* See, *e.g.*, *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 265 (1945); *United States* v. *California*, 332 U. S. 19, 28 (1947); *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 47 (1950); *United States* v. *Turley*, 352 U. S. 407, 415 n. 14 (1957); *Black* v. *Magnolia Liquor Co.*, 355 U. S. 24, 26-27 (1957); *United States* v. *Wise*, 370 U. S. 405, 411 (1962).

Whether an exchange promoting only a purely private enterprise would benefit "public interests" is wholly academic here. North American wants the selected lands for defense projects, not to make bonbons or nostrums. Unquestionably public interests benefit by expanding a contractor's facilities to make needed defense materiel.*

3. *No Question Arises Whether the Act Authorizes Exchanges of Benefit Only to National Defense*

Moreover, the issue here is not whether the Act authorizes exchanges promoting *only* "national defense purposes" (Pet. p. 2). This particular exchange would also benefit grazing interests. So the Secretary found. All three judges on the Court of Appeals agreed (*supra*, pp. 8, 9).

The real question here is very narrow. Must the Secretary's approval of the exchange be enjoined because he did not ignore its benefits to national defense?

Unanimously the court below concluded that, even reading "public interests" to exclude national defense, the Secretary's decision should stand. In effect, it held the Secretary was not obliged to disregard national defense benefits.

That conclusion, we submit, was plainly correct and presents no legal question warranting review by this Court.

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* See, *e.g.*, *United States* v. *243.22 Acres of Land, etc.*, 129 F. 2d 678 (2 Cir. 1942), cert. den. 317 U. S. 698 (1943); *United States* v. *Marin*, 136 F. 2d 388, 389 (9 Cir. 1943); *Harwell* v. *United States*, 316 F. 2d 791, 793 (10 Cir. 1963).

B. The Act Does Not Require the Secretary to Ignore Benefits to National Defense When Acting Under Section 8(b)

Even under a more restrictive statute than section 8(b) of the Act, a recognized national interest need not be ignored.

Years ago a Commission, authorized by statute to buy land only to promote navigation or timber production, wished to purchase land valuable principally for recreation. Noting it could not approve a purchase "solely" or "merely" to provide recreation, Mr. Justice Jackson (when Acting Attorney General) ruled that if "Federal control of lands will promote one of the purposes mentioned in the statute it may approve their purchase notwithstanding they may be 'principally valuable for recreation.'" 39 Op. Atty. Gen. 369, 371 (1939).*

Far from requiring the Secretary to disregard so recognized an interest as national defense when considering exchanges, the broad "public interests" language of section 8(b) clearly permits him to take it into account.

1. *The Broad Scope of "Public Interests."* Congress would not ignore defense benefits if it passed on the proposed exchange directly. Nor did it require the Secretary to view exchanges in blinders.

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* Cf. *Oklahoma v. Atkinson Co.*, 313 U.S. 508, 533-534 (1941); *United States v. Grand River Dam Authority*, 363 U.S. 229, 233 (1960): "... the fact that ends other than flood control will also be served, or that flood control may be relatively of lesser importance, does not invalidate the exercise of the authority conferred on Congress."

When Congress had grazing interests in mind, it said so plainly. Grazing district lands must be "chiefly valuable for *grazing* and raising forage crops" (section 1; 43 U. S. C. A. §315). Other lands must be "principally valuable for *grazing*" (section 13; 43 U. S. C. A. §315l) or "chiefly valuable for *grazing purposes*" (43 U. S. C. A. §315m-1). State selections may not inhibit use of "the remaining land in such district for *grazing purposes*" (section 8(c); 43 U. S. C. A. §315g(c)). The Secretary may lease certain tracts "for *grazing purposes*" (section 15; 43 U. S. C. A. §315m).

By contrast, section 8(b) refers broadly to "public interests." Such terms provide a standard which "leaves wide discretion and calls for imaginative interpretation," *Federal Communications Comm.* v. *RCA Communications, Inc.*, 346 U. S. 86, 90 (1953), and connote "a flexible balancing process, in the course of which all the factors are weighed prior to final determination." *Federal Power Comm.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1, 23 (1961). National defense is one factor to be weighed.*

2. *The Breadth of "Public Interests" in Section 8(b).* Under section 8(b), non-grazing land may be exchanged for other non-grazing land. Since 1936, the property acquired by the Government may be "*any* privately owned lands within or without the boundaries of a grazing district"

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* See, *e.g.*, *National Coal Assn.* v. *Federal Power Comm.*, 89 U. S. App. D. C. 135, 140, 142, 191 F. 2d 462, 467, 469-470 (1951); *City of Pittsburgh* v. *Federal Power Comm.*, 99 U. S. App. D. C. 113, 126-127, 237 F. 2d 741, 754-755 (1956).

(43 U. S. C. A. §315g(b)).* It does not become grazing district land if located outside a district.**

Section 8(b) thus requires no benefit at all to grazing interests or public land administration. It contrasts markedly with section 8(a), under which the Secretary may accept gifts of lands only to "promote the purposes of a district or facilitate the administration of the public lands" (43 U. S. C. A. §315g(a)).***

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* Prior to 1936, the offered lands had to be "privately owned lands within the exterior boundaries of said grazing district." Act of June 28, 1934, c. 865, §8, 48 Stat. 1272. No basis exists for the speculation that the 1936 amendment was "for the limited purpose of acquiring land needed for stock driveways adjacent to grazing districts" (*infra*, p. A12 n. 13). That reason partially underlay only a 1948 amendment confined to section 8(a), which has significantly more limited language than section 8(b).

The selected lands may be either "surveyed grazing district land *or* . . . unreserved surveyed public land in the same State" or fifty miles inside the nearest State (43 U. S. C. A. §315g(b)).

** Prior to 1936, "lands conveyed to the United States under this Act shall, upon acceptance of title, become public lands and *parts of the grazing district* within whose exterior boundaries they are located." Act of June 28, 1934, c. 865, §8, 48 Stat. 1272. Now section 8(d) provides that "lands conveyed to the United States under this chapter shall, upon acceptance of title, become public lands, and if *located within the* exterior boundaries of *a grazing district* they shall become a part of the district within the boundaries of which they are located" (43 U. S. C. A. §315g(d)).

*** The concurring judge thought the "more general language in §8(b)" only indicated "that in an exchange of lands, there will be more than one factor to consider under the heading of grazing interests" (*infra*, p. A12). If Congress had only that in mind, one wonders why it did not say so directly or adapt the restrictive language of section 8(a)."

3. *The Act Promotes Non-Grazing As Well As Grazing Interests.* In general, the "Act seeks to provide the *most beneficial use* of the public range and to protect grazing rights in the districts it creates." *Hatahley* v. *United States*, 351 U. S. 173, 177 (1956).

The Act recognizes that land in grazing districts—which are authorized "to promote the highest use of the public lands pending its final disposal" (section 1; 43 U. S. C. A. §315)—benefits many non grazing interests.* In fact, a 1947 amendment required the Secretary, when fixing grazing permit fees, to "take into account the extent to which such districts yield *public benefits over and above* those accruing to the users of the forage resources for *livestock purposes*" (section 3; 43 U. S. C. A. §315b).

Likewise Congress recognizes that land may be taken out of a grazing district to promote non-grazing public interests.

During World War II, "vast tracts of land in a number of Western States" were withdrawn from grazing districts

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*Erosion "jeopardizes the water supply for irrigation, *urban consumption*, and other uses." S. Rep. No. 1182, 73d Cong., 2d Sess., p. 2 (1934); H. Rep. No. 903, 73d Cong., 2d Sess., p. 2 (1934). [These reports are cited hereafter as "Senate Report" and "House Report."] The Act authorizes the Secretary "to continue the study of erosion and flood control and to perform such work as may be necessary amply to protect and rehabilitate the areas . . ." (section 2; 43 U. S. C. A. §315a), and protects rights "to the possession and use of water for mining, agriculture, *manufacture, or other purposes* . . ." (section 3; 43 U. S. C. A. §315b). Mining interests (section 6; 43 U. S. C. A. §315e), non-grazing interests in timber and other range resources (section 5; 43 U. S. C. A. §315d), and the range's wildlife resources (section 1; 43 U. S. C. A. §315) are also protected.

for defense purposes. 88 Cong. Rec. 5594, 5651-5653 (1942). The withdrawals were sustained by the courts and ratified by Congress.*

Moreover, as expanded in 1936, the Act empowers the Secretary to classify any grazing district lands "more valuable or suitable for *any other use* than for the use provided for under this chapter" and open them "for disposal in accordance with such classification under applicable public-land laws" (section 7; 43 U. S. C. A. 315f).

Thus the Act recognizes and promotes non-grazing public interests. All the more reason exists not to confine "public interests" in section 8(b) to grazing interests.

4. *The Legislative History Shows That Exchanges Were Authorized in the "Best Public Interests."*** No one said, or even suggested, that the Secretary had to ignore non-grazing public interests when considering exchanges.

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* Several provisions of the Act (sections 1, 7, 8(c), 13 and 15; 43 U. S. C. A. §315, 315f, 315g(c), 315l and 315m), including one added in 1962 (43 U. S. C. A. §315, l), recognize the power to withdraw or reserve lands. Withdrawals to promote national defense were upheld in *Osborne* v. *United States*, 145 F. 2d 892 (9 Cir. 1944); see *United States* v. *Cox*, 190 F. 2d 293, 296 (10 Cir. 1951), cert. den. 342 U. S. 867 (1951). To authorize a very limited remedy, Congress passed a statute (now 43 U. S. C. A. §315q) which in effect ratified the withdrawals. *United States* v. *Midwest Oil Co.*, 236 U. S. 459 (1915); *Brooks* v. *Dewar*, 313 U. S. 354, 361 (1941).

** For brevity, we mention only the history of the exchange provision. Doubtless the bill was designed to conserve the range in aid of the livestock industry (Pet. p. 9), but it went further. "While it will be extremely beneficial to the livestock industry, it also safeguards the interest of the Nation and the public as a whole, in the resources of the public range." Senate Report, p. 2; House Report, p. 2.

Exchanges were authorized "for the mutual benefit of those concerned"*—not just "the Government and ranchers" (Pet. p. 10):

> "Senator CAREY. Would this be possible under the act: For railroads to consolidate their lands?
>
> "Mr. HAVELL. Yes, sir; under this act. . . .
>
> "Senator O'MAHONEY. *In other words, any owner, private or public, within the district may under the terms of this bill make an exchange of his land?*
>
> "Mr. HAVELL. Yes, sir."**

Approving the Act, President Roosevelt said of the exchange provision (54 I. D. 523):

> "The act permits private persons owning lands within a district to make exchanges for federally owned land outside a grazing district if and when the Secretary of the Interior finds it to be *in the best public interests.*"

The "best public interests" go beyond grazing and include national defense.

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* Secretary Ickes wrote: "Section 8, recognizing that these districts will necessarily frequently contain lands in private ownership or owned by States or railroads, makes provision for the Secretary, in his discretion, to make exchanges of lands for the mutual benefit of those concerned." Senate Report, p. 6. See also, Senate Report, p. 3, and House Report, p. 3, which added the expression "in the interest of consolidating grazing areas" because the original Act required the offered lands to be inside a grazing district (*supra*, p. 14, n. *).

** *Hearings before the Senate Public Lands and Survey Committee*, 73d Cong., 2d Sess., on H. R. 6462, p. 98 (1934). Repeatedly it was noted that railroads could exchange checkerboard lands. *Ibid.*, pp. 16-17, 96-97; *Hearings before the House Public Lands Committee*, 73d Cong., 1-2 Sess., on H. R. 6462, p. 91 (1934).

Far from narrowing or limiting the exchange provision —as it has withdrawals*—Congress has expanded it.** Nothing in the legislative history says the Secretary must ignore the fact that an exchange will further vital defense work.

5. *The Prior Decisions Support the Secretary.* All the earlier decisions held that non-grazing interests are properly taken into account under section 8(b).*** No prior

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* 43 U. S. C. A. §156 (Pet. p. 11) prevents the Defense Department from unduly depleting Government land by withdrawals entailing the use of Government funds for Government facilities. Here North American will be using its own funds to erect its own facilities on its own land, and the exchange will increase rather than deplete the supply of public land (108).

Petitioners' reference (Pet. pp. 11-12) to the statute (43 U. S. C. A. §315q) regarding payment of "fair and reasonable" amounts after Government agencies withdraw grazing lands for defense purposes is peculiarly without merit. North American voluntarily offered to pay "fair and reasonable" compensation for their grazing privileges (111, 199-200)—indeed, to buy their whole ranch at a fair price fixed impartially (90, 111-112, 225-226).

** For the 1936 amendments, see *supra*, pp. 13-14. Concurrently Congress broadened section 7 "to make available for private entry lands which are more valuable for other purposes than grazing." S. Rep. No. 2371, 74th Cong., 2d Sess., p. 2 (1936). The 1947 amendment also underscored the importance of non-grazing interests (*supra*, p. 15).

*** See *e.g.*, *Ozzen Ault et al.*, A-27845 (Mar. 30, 1959)—exchange approved solely to serve a "national defense need" (p. 3); *Leo Zager et al.*, 60 I. D. 255 (1948)—exchange approved to consolidate "Federal ownership of lands within the Joshua Tree National Monument" (p. 258), a historical and scientific site, see Proclamation No. 2193, 50 Stat. 1760 (Aug. 10, 1936); *Elbert Q. Jensen*, 60 I. D. 231 (1948)—"prospect of improving the administration" of a national forest" suffices (pp. 231-232); *George E. Tolmie and Robert Hoagland*, A-26622 (Oct. 2, 1952)—exchange approved to enable use of selected lands for farming. Likewise, non-grazing interests have been considered when denying exchanges, even though they would benefit grazing interests. See, *e.g.*, *George Z. Herrell*, A-26508 (Jan. 15, 1953)—public recreation; *A. Portland Halle II*, A-24300 (Jan. 23, 1947)—home sites.

case said otherwise—not even the lone dictum which petitioners stress (Pet. p. 10).*

This Court does not decide whether the Secretary's "construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in judicial proceedings" but whether "it has 'warrant in the record' and a 'reasonable basis in law.'" *Unemployment Compensation Comm.* v. *Aragon*, 329 U. S. 143, 153-154 (1946).

Here the Secretary's conclusion is not only reasonable but sound. "Instead of being clearly wrong, the Secretary's action seems to us to have been quite correct" (*infra*, p. A8). No question under section 8(b) of the Act warrants review by this Court.

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* *Land Exchange with States under Taylor Grazing Act*, 55 I. D. 9 (1934), held that a State-proffered exchange was not mandatory. Falsely assuming the Act was simply one "to regulate grazing on the public lands" (p. 10), the Solicitor said *obiter* it authorized only "exchanges which will benefit the public interests in regulation of grazing" (p. 11). Even were that so, this exchange—which does benefit such interests (*supra*, pp. 8, 9)—would stand. Amendments (*supra*, p. 18 n. **) underscore the falsity of his premise. Later decisions show the dictum ceased long ago to have any weight; the Secretary's repudiation of it alone renders its weight "less than substantial." *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U. S. 316, 332 (1961). The Solicitor misconstrued legislative intent so badly that his holding was criticized the next year, and overruled the year after, as violating Congress' original intent. *Hearings before the Senate Committee on Public Lands and Surveys on S. 2539*, 74th Cong., 1st Sess., pp. 47, 69 (1935); see *State Application to Exchange Lands under Section 8 of the Taylor Grazing Act*, 61 I. D. 270, 273-274 (1954).

II.

No Question Herein Under Section 9 of the Act, or Under the Fifth Amendment, Merits Review by This Court

Petitioners' omnibus second question (Pet. p. 2) simply does not arise in this case.

As the Court of Appeals said, since petitioners "were heard at length on their protest against the proposed exchange, it is apparent their real complaint is that no formal evidentiary hearing was held" (*infra*, p. A7). None was required.

A. The Act Did Not Require a Trial-Type Hearing

Petitioners' argument on section 9 of the Act may be disregarded as a sheer afterthought (227-228).* In any event, it has no merit.

To what the Court of Appeals said (*infra*, p. A7), we may add that section 9—which provides for "*local* hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department" (43 U. S. C. A. (315h)—was adopted only so that appeals would be heard by "local people who understand local conditions."** For over two decades, it has

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* *Unemployment Compensation Comm.* v. *Aragon*, 329 U. S. 143, 155 (1946); *United States* v. *Capital Transit Co.*, 338 U. S. 286, 291 (1949).

** The bill first provided: "The Secretary of the Interior shall provide by appropriate rules and regulations for appeals from the decision of the administrative officer in charge." *Hearings before the Senate Public Lands and Survey Committee*, 73d Cong., 2d Sess., on H. R. 6462, p. 100. After the suggestion that appeals be heard by the local land offices, "people more or less acquainted with this matter" and "local people who understand local conditions" (*ibid.*, p. 102), the bill was amended to read as the Act now does (78 Cong. Rec. 11150).

uniformly been held inapplicable to exchange applications.*

B. The Constitution Did Not Require a Trial-Type Hearing

"Congress has plenary power to dispose of public lands." *Ruddy* v. *Rossi*, 248 U. S. 104, 106 (1918). Conferred by the Constitution (Art. IV, § 3, cl. 2), that power "is without limitations." *United States* v. *San Francisco*, 310 U. S. 16, 29 (1940).**

This plenary power would be limited sharply if the Government could not dispose of its property without first holding a trial-type hearing.

1. *The Governmental Function Involved.* Important are the "precise nature of" both "the government function involved" and "the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U. S. 886, 895 (1961).

Here, as in *McElroy*, the "governmental function operating" is "not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business" but the right to act "as pro-

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* See, *e.g.*, *Stewart* v. *Eastern Oregon Land Co.*, 57 I. D. 95, 100 (1940); *Steele* v. *Kirby*, 60 I. D. 389, 394 (1950); *George Z. Hertell*, A-26508, pp. 1-2 (Jan. 15, 1953); *Glenera Sheehan Hunter*, A-27267, p. 4 (Feb. 29, 1956); *J. D. Critchlow et al.*, A-27907, p. 2 (Aug. 4, 1959). Petitioners' generalizations about the departmental practice in "cases of adjudication" (Pet. p. 16) are incorrect—see *E. L. Cord, dba El Jigas Ranch*, 64 I. D. 232, 238, 242 (1957)—and beside the point (*infra*, p. 22).

** See also, *e.g.*, *United States* v. *California*, 332 U. S. 19, 27 (1947); *Federal Power Comm.* v. *Idaho Power Co.*, 344 U. S. 17, 21 (1952); *Alabama* v. *Texas*, 347 U. S. 272, 273-274 (1954); *Ivanhoe Irrigation District* v. *McCracken*, 357 U. S. 275, 294-295 (1958).

prietor" of the Government's property (367 U. S., at p. 896).

"Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein." *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 474 (1915). It exercises over the Government's "own lands, the rights of an ordinary proprietor" and "may deal with such lands precisely as a private individual may deal with his farming property." *Camfield* v. *United States*, 167 U. S. 518, 524 (1897).*

Before exercising the proprietary right to dispose of its own land, the Government need not accord a hearing to a man temporarily permitted to graze cows on the property, any more than would a farmer owning the land. Just as when it acquires property, the necessity and expediency of its action involve "legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process . . ." *Bragg* v. *Weaver*, 251 U. S. 57, 58 (1919).**

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* See also, *Light* v. *United States*, 220 U. S. 523, 536 (1911); *Sinclair* v. *United States*, 279 U. S. 263, 297 (1929); *United States* v. *Standard Oil Co. of California*, 332 U. S. 301, 306 n. 9 (1947); *Alabama* v. *Texas*, 347 U. S. 272, 273 (1954).

** See also, *Joslin Mfg. Co.* v. *Providence*, 262 U. S. 668, 678 (1923); *Rindge Co.* v. *County of Los Angeles*, 262 U. S. 700, 709 (1923); *Georgia* v. *City of Chattanooga*, 264 U. S. 472, 483 (1924); *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 284 (1925); *Combs* v. *Illinois State Toll Highway Comm.*, 128 F. Supp. 305, 308-310 (N. D. Ill. 1955), affd. 349 U. S. 942 (1955); *cf. United States* v. *Carmack*, 329 U. S. 230, 247 (1946). Likewise the administrative judgment as to the comparative values or quantity involved "cannot be said to be a judicial act." *Shoemaker* v. *United States*, 147 U. S. 282, 301 (1893); see also, *United States* v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668, 685 (1896); *Berman* v. *Parker*, 348 U. S. 26, 35-36 (1954); *Starr* v. *Nashville Housing Authority*, 145 F. Supp. 498, 503 (M. D. Tenn. 1956), affd. 354 U. S. 916 (1957).

Like *McElroy*, this case "involves the Federal Government's dispatch of its own internal affairs" (367 U. S., at p. 896). No hearing, much less a trial-type hearing, was required.*

2. *The Private Interest Affected.* Here too petitioners' citations are inapposite. The "private interest" affected, as in *McElroy*, "most assuredly was not the right to follow a chosen trade or profession" (367 U. S., at pp. 895-896).** Clearly petitioners' livelihood is not involved (*supra*, p. 6).

"We deal here with the federal domain, an area which Congress can completely pre-empt, leaving no vested private claims that constitute 'private property' within the meaning of the Fifth Amendment." *United States* v. *Twin City Power Co.*, 350 U. S. 222, 227 (1956).

Congress has acted accordingly. As proprietor, the Government could always recall a grazing license at any time. *Light* v. *United States*, 220 U. S. 523, 535 (1911). The Act expressly reserves the Government's full proprietary

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* See also, *e.g.*, *Ove Gustavsson Contracting Co.* v. *Floete*, 299 F. 2d 655, 660 (2 Cir. 1962), cert. den. 374 U. S. 827 (1963); *Gillioz* v. *Webb*, 99 F. 2d 585, 586-587 (5 Cir. 1938); *Brand* v. *Chicago Housing Authority*, 120 F. 2d 786, 788 (7 Cir. 1941); *Alliance Construction Co.* v. *United States*, 79 Ct. Cl. 730, 732, 734-735 (1934); *Gilbert Engineering Corp.* v. *United States*, 82 Ct. Cl. 616, 626 (1936).

** "All that was denied her was the opportunity to work at one isolated and specific military installation" (p. 896). Petitioners are denied only the opportunity to graze livestock on the selected lands. They may follow any occupation they choose, and graze cattle on any land they own or acquire or lease. If they accept North American's generous offers, they should have no difficulty in finding other grazing property.

rights. The "grazing privileges" are safeguarded only so "far as consistent with the purposes and provisions of this chapter"—including, of course, the exchange provision—and a permit "shall not create any right, title, interest, or estate in or to the lands" (section 3; 43 U. S. C. A. §315b).

Grazing privileges under the Act "do not fall within the conventional category of vested rights in property." *Red Canyon Sheep Co.* v. *Ickes*, 69 U. S. App. D. C. 27, 34, 98 F. 2d 308, 315 (1938). They are only "interim grants of privileges," *E. L. Cord, dba El Jiggs Ranch*, 64 I. D. 232, 242 (1957), taken subject to the Government's right to dispose of the land at any time.*

Even if "the fee lands are practically worthless without them," grazing permits "are not an interest protected by the Fifth Amendment against the taking by the Government who granted them with the understanding that they could be withdrawn at any time without the payment of compensation." *United States* v. *Cox*, 190 F. 2d 293, 295, 296 (10 Cir. 1951), cert. den. 342 U. S. 867 (1951).

Where the private interest affected is, as here, "a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required." *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U. S. 886, 895 (1961). Certainly no trial-type hearing was needed.

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* See also, *McNeil* v. *Seaton*, 108 U. S. App. D. C. 296, 299, 281 F. 2d 931, 934 (1960); *Osborne* v. *United States*, 145 F. 2d 892, 896 (9 Cir. 1944); *United States* v. *West*, 232 F. 2d 694, 698 (9 Cir. 1956), cert. den. 352 U. S. 834 (1956); *Oman* v. *United States*, 179 F. 2d 738, 742 (10 Cir. 1949); *Fauske* v. *Dean*, 78 S. Dak. 310, 101 N. W. 2d 769, 772 (1960).

III.

No Question Herein Under Section 3 of the Act Merits Review by This Court

The abstract third question posed (Pet. p. 2) does not really arise. The actual issue is whether petitioners' pledge of their grazing unit (*supra*, p. 6) prevents the Government from exchanging its lands to benefit public interests. The argument is another afterthought not raised before the Secretary. (127).

Section 3, which authorizes the Secretary to issue "permits to graze livestock on such grazing districts," says he shall not deny "the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan" (43 U. S. C. A. §315b).

That provision does not prevent the Government from disposing of its land. On the contrary, it presupposes the land still remains in the grazing district.*

Much more explicit language would be needed to work the profound restraint on alienation for which petitioners contend.** Even a statutory preference to acquire Government property conveys no "interest in the property as to deprive the owner of the power to control its disposition."

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* *Cf. Fox v. Cincinnati*, 104 U. S. 783, 785-786 (1881); *Kirk v. Maumee Valley Electric Co.*, 279 U. S. 797, 803-804 (1929); *Transcontinent Television Corp. v. Federal Communications Comm.*, 113 U. S. App. D. C. 384, 389, 308 F. 2d 339, 344 (1962).

** *Chapman v. Sheridan-Wyoming Coal Co., Inc.*, 338 U. S. 621, 626-627 (1950); *United States v. Grand River Dam Authority*, 363 U. S. 229, 235 (1960).

The Yosemite Valley Case, 15 Wall. [82 U. S.] 77, 94 (1872).*

Far from aiding petitioners, the original legislative history shows Congress would not let a permittee's pledge block disposition of Government lands.** The later legislative history means nothing.***

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* See also, *e.g.*, *Enblen* v. *Lincoln Land Co.*, 184 U. S. 660, 664 (1902); *Russian-American Packing Co.* v. *United States*, 199 U. S. 570, 577-578 (1905); *Haley* v. *Seaton*, 108 U. S. App. D. C. 257, 260-261, 281 F. 2d 620, 623-624 (1960).

** See 78 Cong. Rec. 11152, 11154, 11162, 12004 (1934).

*** The "interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance here." *United States* v. *Wise*, 370 U. S. 405, 411 (1962); see also, *Securities and Exchange Comm.* v. *Capital Gains Research Bureau, Inc.*, No. 42, October Term, 1963, pp. 19-20 (Dec. 9, 1963).

CONCLUSION

No question meriting review by this Court is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: December 31, 1963

Appendix A: Opinions Below

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,711

W. DALTON LARUE, SR., et al., APPELLANTS

v.

STEWART L. UDALL, individually and as Secretary of the Interior,

and

NORTH AMERICAN AVIATION, INC., APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided October 3, 1963

Mr. David Ginsburg, with whom *Mr. Leonard N. Bebchick* was on the brief, for appellants.

Mr. Edmund B. Clark, Attorney, Department of Justice, with whom *Assistant Attorney General Clark*, *Messrs. Roger P. Marquis* and *Thomas L. McKevitt*, Attorneys, Department of Justice, were on the brief, for appellee Udall.

Mr. Charles Pickett, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Warren E. Baker* was on the brief, for appellee

North American Aviation, Inc. *Mr. Joseph F. Healy, Jr.*, also entered an appearance for appellee North American Aviation, Inc.

Before BAZELON, *Chief Judge*, and WILBUR K. MILLER and BURGER, *Circuit Judges*.

WILBUR K. MILLER, *Circuit Judge*: The appellants operate a cattle ranch located within the boundaries of Carson City Grazing District No. 3, Nevada. They own in fee about 1,600 acres in five non-contiguous tracts, and are licensed to graze their cattle on approximately 10,000 acres of public land. Due to the railroad grants of the Nineteenth Century, the area is made up of both publicly and privately owned tracts in a checkerboard pattern.

Appellee North American Aviation, Inc., is a large corporation engaged in the development and manufacture of rocket engines and rocket power plants and in research in that field. Having progressed to the point where it needed a very large body of land in an isolated area for the development of its program, North American acquired title to a considerable portion of the privately owned lands in the portion of Carson City Grazing District No. 3 heretofore utilized by the appellants. In order to complete its project, North American needed to acquire the large acreage of public lands under grazing license to the appellants.

In exchange for this portion of Carson City Grazing District No. 3, which has an appraised value of $86,400, North American offered the United States more than 20,000 acres lying within the boundaries of Winnemucca Grazing District No. 2, Nevada, which has an appraised value of $90,100. This land is a substantial distance from the land North American desired to obtain.

The appellants protested that the exclusion of their cattle from the area sought by North American would seriously curtail, if not destroy, their ranching opera-

tion; as the lands owned by them in fee will not sustain it; and they asserted that § 8(b) of the Taylor Grazing Act[1] which authorizes the Secretary of the Interior in some circumstances to make such exchanges does not authorize the exchange proposed by North American. Arguments pro and con on appellants' protest, including affidavits and memoranda of law, were considered by the lower echelons of the Department and finally the matter reached the Secretary of the Interior. In a somewhat lengthy opinion, in which he discussed the matter in detail, the Secretary approved the exchange.

Thereupon, the appellants complained to the United States District Court for the District of Columbia, challenging the legality of the exchange so approved. The District Court having affirmed the Secretary's decision, the appellants brought this appeal.

They contend that § 8(b) of the Taylor Grazing Act does not authorize the Secretary of the Interior to issue a patent for public grazing land to a private organization for industrial use, even for national defense purposes, especially when his act in so doing will terminate a grazing license and destroy a ranching operation. Their principal argument is that § 8(b) authorizes the exchange of publicly owned grazing lands for privately owned lands only when the public interests in grazing on the public

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[1] That section, which is 43 U. S. C. § 315g (b), is as follows:

"(b) When public interests will be benefited thereby the Secretary is authorized to accept on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands."

range and in conservation will be benefited thereby.[2] That North American will not use the lands for grazing or conservation purposes is not disputed.

The term "public interests" in § 8(b) is not defined by that section, nor is it limited or restricted in any way. If Congress had intended to restrict the meaning of those words in the manner urged by the appellants, we think it would have said so. Such a qualification could easily have been inserted in the statute. It seems to us that the Secretary correctly construed § 8(b) when he said in his opinion:

> ". . . [T]he benefit to the public interests, which is the criterion of the statute, need not be related exclusively to conservation of Federal grazing resources nor need it be shown that a proposed exchange will promote range management. . . . [T]he Taylor Grazing Act is a multiple purpose act and while its chief immediate purpose was to stop injury to the public domain by unregulated grazing and to promote the stabilization of the livestock industry, section 1 of the act authorizes the Secretary of the Interior to establish grazing districts in order to promote the highest use of the public domain 'pending its final disposal.' Section 3 authorizes the Secretary to issue permits to graze livestock on such grazing districts but provides that the issuance of such permits shall not create any right, title, interest, or estate in or to the lands. Section 7, as amended by the act of June 26, 1936, authorizes the Secretary to examine and classify lands within grazing districts and to open such of those lands as he finds to be more valuable or suitable for other purposes than grazing or proper for acquisition in satisfaction of outstanding rights to disposition under applicable public land

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[2] Appellants point out that a former Solicitor of the Department of the Interior took this view of the section and that, in this case, the Associate Director of the Bureau of Land Management so interpreted it.

laws, after reasonable notice has been given to grazing permittees. Section 14 of the act (43 U. S. C., 1958 ed., *sec.* 1171) authorizes the Secretary to order into market and sell at public auction isolated or disconnected tracts of the public domain and tracts which are mountainous and too rough for cultivation.

"Thus nothing in the other sections of the act suggest that private interests may not acquire public land being used for grazing purposes to the detriment of those licensed to use the land."

We observe, moreover, that § 8(b) expressly authorizes the Secretary to exchange surveyed public land for privately owned land outside a grazing district. It is also true, as the Secretary's opinion pointed out, that North American's acquisition of large acreage of privately owned land in the area of the selected land has reduced the importance of grazing in the area.

Even under appellants' restricted view of the meaning of the statutory words "public interests," it is clearly the Secretary's duty, in considering a proposed exchange, to consider its net result: to compare the advantages which the offered land would bring to conservation and the grazing industry with any disadvantage to those interests which might result to them from the withdrawal of the selected lands from a grazing district. This the Secretary seems to have done, as he held "that acquisition of the offered lands would block out holdings of public lands and would facilitate the administration and management of the area for grazing purposes." Thus appellee Udall gave another reason for approving the exchange in addition to his interpretation of § 8(b). We think he was right in both respects.

Appellants also assert that their grazing unit has been and is pledged as security for *bona fide* loans, and that therefore the Secretary may not terminate their grazing permit. As a basis for the assertion they rely upon the

language we have italicized in the following portion of § 3 of the Taylor Grazing Act (43 U. S. C. § 315b):

> ". . . Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water, or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that *no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. . . .*"

Their contention is that if the Secretary may not refuse to renew a permit when the permittee's grazing unit is pledged as security for a *bona fide* loan, "he can hardly bring about the same result indirectly by terminating a permit prior to the expiration of the term . . . ." As the context shows, the provision relied upon by the appellants is one of the factors to be considered by the Secretary in establishing preferences between conflicting applications for permits on the federal range. By no means should it be construed as providing that, by maintaining a lien on his grazing unit, a permittee may also create and maintain a vested interest therein which will prevent the United States from exchanging it under § 8(b).

Another point on appeal is thus stated by the appellants:

> "Appellee Udall acted unlawfully and deprived appellants of due process (a) by denying a full and fair hearing in derogation both of the provisions of the Taylor Grazing Act and the Fifth Amendment; (b)

> by denying access to the full record on which appellee Udall's decision was based; and (c) by denying appellants the protection afforded by the Administrative Procedure Act."

As appellants were heard at length on their protest against the proposed exchange, it is apparent their real complaint is that no formal evidentiary hearing was held. We find nothing in the Taylor Grazing Act which requires a hearing on such a protest. Section 8, dealing with exchanges, merely requires publication of notice of a contemplated exchange. Where Congress intended a hearing to be held, it provided therefor in express terms, as it did in § 1 of the Taylor Grazing Act (43 U. S. C. § 315):

> ". . . Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given, at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held . . ."

Section 9 of the Act (43 U. S. C. § 315h) does provide for "local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedures in the land department." We think the provision does not apply to applications for exchange under § 8(b); a matter in which no local administrative officer is "in charge," but only to matters that arise in the administration of grazing districts.

Appellants' reliance on the Fifth Amendment disregards the provision of § 3 of the Act (43 U. S. C. § 315b) that

> ". . . So far as consistent with the purposes and provisions of this chapter, grazing privileges recog-

> nized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this chapter shall not create any right, title, interest, or estate in or to the lands."

The command of Congress that grazing privileges shall be adequately safeguarded "so far as consistent with the purposes and provisions of this chapter" does not mean that a grazing permit is to prevent the Government's exercise of the right of exchange, which is "one of the provisions of this chapter."

The Administrative Procedure Act does not require a hearing here, as § 5 of that measure (5 U. S. C. § 1004) applies only to agency action which the agency statute provides must be preceded by a hearing. *Springfield Airport Authority* v. *C. A. B.*, 109 U. S. App. D. C. 197, 198 n. 1, 285 F. (2d) 277, 278 n. 1 (1960).

We have carefully considered all the other contentions made by the appellants, but do not find in them any reason for disturbing the Secretary's decision. As we said in *Safarik* v. *Udall*:[3]

> "It is obvious that the Secretary of the Interior, in carrying out his functions in the administration and management of the public lands, must be accorded a wide area of discretion and it is a well-recognized rule that administrative action taken by him will not be disturbed by a court unless it is clearly wrong."

Instead of being clearly wrong, the Secretary's action seems to us to have been quite correct. The District Court's judgment upholding his decision will be affirmed.

It is so ordered.

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[3] 113 U. S. App. D. C. 68, 74, 304 F. (2d) 944, 950, *cert. denied sub nom.* Hansen v. Udall, 371 U. S. 901 (1962).

BAZELON, *Circuit Judge*, concurring: Under § 8(b) of the Taylor Grazing Act, 43 U.S.C. § 315g(b) (1958), any landowner may propose to exchange his land ["offered" lands] for federal land of equal value located within a grazing district ["selected" lands]; and the Secretary of the Interior may approve the exchange if "public interests will be benefited thereby." In this case, because the Secretary viewed the Taylor Act as a "multiple purpose" statute, he construed the term "public interests" as a broad reference to the general public interest, rather than being limited to grazing interests. In approving the exchange, the Secretary relied heavily on his finding that the exchange would benefit the general public interest, but he also found that the exchange would benefit grazing interests.[1] This court holds that the exchange may be approved on either ground. I think approval can rest only on a finding of benefit to grazing interests.

The Taylor Grazing Act of 1934[2] closed the public domain, climaxing the reversal of earlier policy which had encouraged disposal of the public lands to private ownership.[3] The policy of land conservation—retaining federal ownership and regulating land use to prevent

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[1] The Secretary's finding of grazing benefit appears from his statements that the importance of grazing in the area of the selected lands has lessened in recent years, and that "acquisition of the offered lands would block out holdings of public lands and would facilitate the administration and management of the area for grazing purposes." *W. Dalton LaRue, Sr.*, A-29309 (1962).

[2] Act of June 28, 1934, 48 Stat. 1269 (1934), as amended, 43 U.S.C. §§ 315, 315a-315r (1958).

[3] See, *e.g.*, *Hearings on H.R. 6462 Before the Senate Committee on Public Lands and Surveys*, 73d Cong., 2d Sess. 46 (1934) (statement by Senator O'Mahoney of Wyoming). See ROBBINS, OUR LANDED HERITAGE 285-423, especially 421-23 (1950); PEFFER, THE

depletion of natural resources—began with the creation of forest reserves after 1891.[4] The Taylor Act extended this policy to the remaining 173,000,000 acres of public lands still unreserved by 1934. To prevent soil deterioration and stabilize the livestock industry which constituted the chief user of this public range,[5] the Secretary of the Interior was authorized to reserve suitable lands for the creation of grazing districts and to regulate grazing within the districts by issuing permits.[6] It was recognized however, that the existing checkerboard pattern of alternating public and private ownership, resulting from the course of land settlement during the nineteenth century,[7] would make it difficult to administer the districts efficient-

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CLOSING OF THE PUBLIC DOMAIN 5, 8-231, 302-41 (1951); CLAWSON & HELD, THE FEDERAL LANDS 15-36 (1957) (Marion Clawson was Director of the Bureau of Land Management in 1948-53).

[4] 26 Stat. 1103 (1891), as amended, 16 U.S.C. § 471 (1958).

[5] See S.REP.NO. 1182, 73d Cong., 2d Sess. (1934), H.R.REP. No. 903, 73d Cong., 2d Sess. (1934); 78 CONG.REC. 6340, 6364-65 (1934). See also Ickes, *The National Domain and the New Deal*, SATURDAY EVENING POST Dec. 23, 1933, p. 10.

[6] Section 1 of the Act originally limited the total amount of land which could be included in grazing districts to 80,000,000 acres. This limitation, inserted to curb the power of the Secretary, 78 CONG.REC. 11140 (1934), was shortly abandoned in order to allow maximum application of the Taylor Act's policies. 49 Stat. 1976 (1936); 68 Stat. 151 (1954); see 80 CONG.REC. 3815-16 (1936). Today there are 161,000,000 acres of federal land in 58 grazing districts. BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS, Table 81 (1962).

[7] Behind the checkerboard pattern is the familiar history of free land entry, railroad land grants, and school land cessions to the States. See Hibbard, *Land Grants*, 9 ENCYC. SOC. SCI. 32 (1937).

ly.[8] To meet this problem, § 8 of the Act was designed to foster consolidation in the manner of earlier forest reserves legislation;[9] the Secretary was authorized to accept land which would consolidate the grazing districts, either by gift or in exchange for other grazing land of equal value.[10]

The legislative history of the Act shows that in authorizing the Secretary to convey public lands to private individuals as part of an exchange, § 8(b) was intended not as a new source of power to alienate federal lands, but simply to promote consolidation of the grazing districts.[11]

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[8] H.R.Rep.No. 903, 73d Cong., 2d Sess. 3, 7 (1934). See Clawson & Held 48-50.

[9] 42 Stat. 465 (1922), 16 U.S.C. § 485 (1958); 43 Stat. 1215 (1925), 16 U.S.C. §510 (1958). See also 16 U.S.C. §§ 480a-480w (1958).

[10] Section 8, Act of June 28, 1934, 48 Stat. 1272 (1934), as amended, 43 U.S.C. § 315g (1958):

> "(a) *Where such action will promote the purposes of a district or facilitate the administration of the public lands*, the Secretary is authorized to accept on behalf of the United States any land within or without the exterior boundaries of a grazing district as a gift.
>
> "(b) *When public interests will be benefited thereby* the Secretary is authorized to accept, on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land . . .
>
> "(c) Upon application of any State to exchange lands within or without the boundaries of a grazing district the Secretary of the Interior shall, and is directed to proceed with such exchange at the earliest practicable date . . . ." [Emphasis supplied.]

[11] See 78 Cong.Rec. 6350 (1934); *Senate Hearings on H.R. 6462*, *supra* note 3, at 94-100. In the Hearings, Representative Taylor said:

> "But I would like to say that under this bill it is not intended

As such, I think that the determination that "public interests will be benefited [by an exchange]" includes only public interests in furtherance of the grazing and range stabilization policies which are the subject of the Act. The term was so construed in an opinion rendered by the Solicitor of the Department of the Interior shortly after the Act's passage,[12] and there is no basis for the Secretary's suggestion that amendments since 1934 have changed the meaning of § 8.[13]

The Secretary argues that where Congress wished to consider only grazing interests, it said so. For this proposition, he cites § 8(a), dealing with the acceptance of gift lands, which requires the specific showing that the acquisition will "promote the purposes of a district or facilitate the administration of the public lands." But I do not think the more general language in § 8(b) was intended to allow the Secretary to go beyond grazing interests for his standards. Rather, it indicates that in an exchange of lands, there will be more than one factor to consider under the heading of grazing interests. Thus

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to make a general exchange arrangement outside, where they [the lands] have nothing to do with this bill." *Id.* at 98.

[12] *Land exchange with States under Taylor Grazing Act*, 55 I.D. 9 (1934).

[13] The only major change was a 1936 amendment eliminating an ambiguity in regard to State exchanges. 49 Stat. 1976 (1936); see *Hearings on S. 2359 Before the Senate Committee on Public Lands and Surveys*, 74th Cong., 1st Sess. 47-78 (1935). Sections 8(a) and 8(b) have been amended to permit the Secretary to accept land situated outside the boundaries of a grazing district, 49 Stat. 1976 (1936); 62 Stat. 533 (1948). But it appears that these amendments were for the limited purpose of acquiring land needed for stock driveways adjacent to grazing districts. *Cf.* S. REP. NO. 1497, 80th Cong., 2d Sess. (1948).

where the Government is conveying land as well as procuring land, it must consider the effect of the transaction not only on administration of the grazing district of the offered land, but also its effect on administration of the grazing district of the selected land and on the interests of grazing licensees of the land to be conveyed.[14] While offered land might meet the required standards, the detriment involved in giving up the selected lands might outweigh the benefit. In *Willis N. Farlow*, 62 I.D. 206 (1955), a proposed exchange of lands equally valuable for grazing was disapproved because of the detrimental effect on two ranchers.

This court agrees with the Secretary that private interests may acquire public grazing land to the detriment of grazing licensees.[15] I also agree. But that does not answer the question in this case. The question here is whether or not such an acquisition *under the exchange*

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[14] Although §3, 43 U.S.C. § 315b (1958), provides that issuance of a grazing permit shall not create any vested right, it also states that "so far as consistent with the purposes and provisions of this chapter, grazing privileges recognized and acknowledged shall be adequately safeguarded." *See Oman v. United States*, 179 F.2d 738 (10th Cir. 1949); *Red Canyon Sheep Co. v. Ickes*, 69 App.D.C. 27, 98 F.2d 308 (1938). Thus, while the existence of an outstanding permit does not preclude an exchange, it is a relevant consideration.

[15] Section 3 of the Act requires the Secretary to renew permits where the grazing unit covered is pledged as security for a bona fide loan. The purpose of this provision was to encourage back credit, see *Hearings on S. 2359 Before the Senate Committee on Public Lands and Surveys*, 74th Cong., 1st Sess. 37-39 (1935); 78 Cong. Rec. 11151-55, 11162 (1934), but there was no indication that it was intended to limit the Secretary's power to consolidate districts by land exchange.

provisions of § 8(b) requires a determination that the net effect of the exchange will benefit public grazing interests. I think this determination is required, and that the grazing value of the offered land is a critical consideration.[16]

A contrary conclusion would be inconsistent with the over-all congressional policy sharply limiting the Secretary's authority to remove land from public ownership. Since 1891, when general alienation of public land was forbidden, land sales have been permitted only by specific legislation.[17] Such legislation is presently limited to a handful of special-purpose statutes, none of which authorizes the sale of land in excess of 1520 acres in a single transaction.[18] The Secretary here claims a grant of authority under § 8(b) which greatly exceeds that under any other public land law.

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[16] Appellees cite two exchanges approved by the Secretary under § 8(b) to show that offered lands need not be valuable for grazing: In *Elbert O. Jensen*, 60 I.D. 231 (1948), the exchange was approved although the offered land was situated within a national forest, and not under the jurisdiction of the Taylor Act. But that case is distinguishable because similar land conservation policies underlie the creation and administration of the forest reserves and the grazing districts, and because grazing is one of the major issues of forest lands. See CLAWSON & HELD 57-60, 200. See also 76 Stat. 140 (1962), 43 U.S.C. §315g-1 (Supp. IV 1959-1962); H.R.REP. No. 1418, 87th Cong., 2d Sess. (1962). In *Owen Ault*, A-27845, which was not appealed, the Secretary based his approval of a proposed exchange on national defense interests. I think he erred.

[17] 26 Stat. 1099 (1891), 43 U.S.C. §671 (1958).

[18] The major provisions are at 43 U.S.C. §§ 321-39, 351-60, 682a-682e, 1171-77 (1958). See summary in CLAWSON & HELD 391-92.

The Taylor Act reflects Congress' determination to limit the Secretary's power.[18] This purpose was reconfirmed as recently as 1958 by the legislative reaction to administrative claims—based on national defense needs—to greater authority over the public lands. Following a report criticizing excessive land demands by the military departments,[20] Congress amended existing legislation authorizing reservation of land for military purposes[21] to require specific congressional authority for each reservation exceeding 5,000 acres.[22] The purpose of the amendment, as described in the Senate Committee Report, was:

> to return from the executive branch to the Congress—to the extent that [public] lands are involved—the responsibility imposed by the Constitution on the Congress for their management.[23]

Nevertheless, in the present case, appellees argue that the special importance of national defense justifies a broad reading of § 8(b). But Congress has provided a method for making land—including grazing land—available for national defense. Under § 7 of the Taylor Act, land found "more valuable or suitable for any other use" than grazing may be reclassified and opened for "disposal in accordance with such classification under applicable public-land laws."[24] And 10 U.S.C. § 2667 (1958) authorizes a private lease "whenever the Secretary of a military department considers it advantageous to the United States." This procedure, although not as expedi-

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[18] See, e.g., 78 Cong. Rec. 11040-43 (1934).

[20] S. Rep. No. 857, 85th Cong., 1st Sess. (1957); see also, H.R. Rep. No. 2850, 84th Cong., 2d Sess. (1956).

[21] 10 U.S.C. § 2667 (1958).

[22] 72 Stat. 27 (1958), 43 U.S.C. §§ 155-158 (1958).

[23] S. Rep. No. 857, 85th Cong., 1st Sess. 3 (1957).

[24] 43 U.S.C. § 315f (1958).

tious as a § 8(b) exchange,[25] is the one fixed by Congress for accommodating national defense interests.

The decrease in grazing since 1934,[26] together with the growing importance of Western commercial and industrial development, may indicate that the Taylor Act's emphasis on grazing is outdated. But Congress has not said so, nor has Congress relaxed its concern with land conservation and retention of federal ownership.[27] If changed circumstances require a view of "public interests" under § 8(b) that goes beyond grazing interests, Congress—not the Secretary—must say so.[28]

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[25] Since the selected land in this case exceeds 5000 acres, specific congressional approval would be required. See note *22 supra*. In addition, North American Aviation would not gain fee title to the land, and holders of grazing licenses would be entitled to compensation for the destruction of their licenses. 56 Stat. 654 (1942), as amended, 43 U.S.C. § 315q (1958).

[26] See CLAWSON & HELD 335.

[27] See INT. DEPT. ANN. REP. (1962): *New Horizons in Resource Conservation*, IX-LXXVI, especially XLVI-L. See also CLAWSON & HELD 346-47.

[28] Congress considered legislation on the subject in 1963. See S. 601, S. 1598, S. 1599, S. 1600, S. 1601, and S. 1602, 88th Cong., 1st Sess. (1963). See also SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 88TH CONG., 1ST SESS., THE PUBLIC LANDS (Comm. Print 1963).

Appendix B: Constitutional and Statutory Provisions Involved

Constitutional Provisions Involved

Article 4, Section 3, Clause 2: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *."

Amendment V: "* * * nor shall any person * * * be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutory Provisions Involved

1. The Taylor Grazing Act and Related Provisions, as Presently Appearing in 43 United States Code, Annotated

CHAPTER 8A.—GRAZING LANDS

§315. Grazing Districts; Establishment; Prior Rights; Rights-of-way; Hearing and Notice; Hunting or Fishing Rights

In order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and or to modify the boundaries thereof, of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands,

or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: *Provided*, That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. Nothing in this chapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in such sections, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this chapter, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction. Whenever any grazing district is established pursuant to this chapter the Secretary shall grant to owners of land adjacent to such district, upon application of any such owner, such rights-of-way over the lands included in such district for stock-driving purposes as may be necessary for the convenient access by any such owner to marketing facilities or to lands not within such district owned by such person or upon which such person has stock-grazing rights. Neither this chapter, nor sections 291-301 of this title, commonly known as the "Stock Raising Homestead Act", shall be construed as limiting the authority or policy of Congress or the President to include in national forests public lands of the character described in section 471 of Title 16, for the purposes set forth in section 475 of Title 16, or such other purposes as Congress may specify. Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given, at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days

after such notice shall have been given, nor until twenty days after such hearing shall be held: *Provided however*, That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry or settlement. Nothing in this chapter shall be construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any State, or as vesting in any permittee any right whatsoever to interfere with hunting or fishing within a grazing district. June 28, 1934, c. 865, § 1, 48 Stat. 1269, as amended June 26, 1936, c. 842, Title I, § 1, 49 Stat. 1976; May 28, 1954, c. 243, § 2, 68 Stat. 151.

§315a. Protection, Administration, Regulation and Improvement of Districts; Rules and Regulations; Study of Erosion and Flood Control; Offenses

The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of section 315 of this title, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this chapter and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; and the Secretary of the Interior is authorized to continue the study of erosion and flood control and to perform such work as may be necessary apply to protect and rehabilitate the areas subject to the provisions of said sections through such funds as may be made available for that purpose, and any willful violation of the provisions of this chapter or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500. June 28, 1934, c. 865, § 2, 48 Stat. 1270.

§315b. Grazing Permits; Fees; Vested Water Rights; Permits Not to Create Right in Land

The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time, and in fixing the amount of such fees the Secretary of the Interior shall take into account the extent to which such districts yield public benefits over and above those accruing to the users of the forage resources for livestock purposes. Such fees shall consist of a grazing fee for the use of the range, and a range-improvement fee which, when appropriated by the Congress, shall be available until expended solely for the construction, purchase, or maintenance of ~~range~~ improvements. Grazing permits shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws, and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of

the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Inferior, who shall specify from time to time numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists: *Provided further*, That nothing in this chapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacture, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of this chapter, grazing privileges recognized and acknowledged shall be adquately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this chapter shall not create any right, title, interest, or estate in or to the lands. June 28, 1934, c. 865, §3, 48 Stat. 1270, amended Aug. 6, 1947, c. 507, §1, 61 Stat. 790.

§315c. Fences, Wells, Reservoirs and Other Improvements; Construction; Permits; Partition Fences

Fences, wells, reservoirs, and other improvements necessary to the care and management of the permitted livestock may be constructed on the public lands within such grazing districts under permit issued by the authority of the Secretary, or under such cooperative arrangement as the Secretary may approve. Permittee shall be required by the Secretary of the Interior to comply with the provisions

of law of the State within which the grazing district is located with respect to the cost and maintenance of partition fences. No permit shall be issued which shall entitle the permittee to the use of such improvements constructed and owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements to be determined under rules and regulations of the Secretary of the Interior. The decision of the Secretary in such cases is to be final and conclusive. June 28, 1934, c. 865, §4, 48 Stat. 1271.

§315d. Grazing Stock for Domestic Purposes; Use of Natural Resources

The Secretary of the Interior shall permit, under regulations to be prescribed by him, the free grazing within such districts of livestock kept for domestic purposes; and provided that so far as authorized by existing law or laws hereinafter enacted, nothing contained in this chapter shall prevent the use of timber, stone, gravel, clay, coal, and other deposits by miners, prospectors for mineral, bona fide settlers and residents, for firewood, fencing, buildings, mining, prospecting, and domestic purposes within areas subject to the provisions of this chapter. June 28, 1934, c. 865, §5, 48 Stat. 1271.

§315e. Rights of Way; Development of Mineral Resources

Nothing contained in this chapter shall restrict the acquisition, granting or use of permits or rights-of-way within grazing districts under existing law; or ingress or egress over the public lands in such districts for all proper and lawful purposes; and nothing contained in this chapter shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of such districts under law applicable thereto. June 28, 1934, c. 865, §6, 48 Stat. 1272.

§315f. Homestead Entry Within District or Withdrawn Lands; Classification; Preferences

The Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this chapter, or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights of land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: *Provided*, That locations and entries under the mining laws sections 181—184, 185—188, 189—194, 201, 202—209, 211—214, 223, 224—226, 226d, 226e, 227—229a, 241, 251, and 261—263 of Title 30 may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any provision of this chapter. Where such lands are located within grazing districts reasonable notice shall be given by the Secretary of the Interior to any grazing permittee of such lands. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: *Provided*, That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter,

select, or locate such lands if opened to entry as herein provided. June 28, 1934, c. 865, §7, 48 Stat. 1272 as amended June 26, 1936, c. 842, Title I, §2, 49 Stat. 1976.

§315g. ACCEPTANCE OF DONATIONS OF LAND; EXCHANGE OF LANDS; NOTICE OF CONTEMPLATED EXCHANGE; RESERVATION OF MINERALS, EASEMENTS, OR RIGHTS OF USE; FEE FOR EXCHANGE

(a) Where such action will promote the purposes of a district or facilitate the administration of the public lands, the Secretary is authorized to accept on behalf of the United States any lands within or without the exterior boundaries of a grazing district as a gift.

(b) When public interests will be benefited thereby the Secretary is authorized to accept on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands.

(c) Upon application of any State to exchange lands within or without the boundaries of a grazing district the Secretary of the Interior shall, and is hereby, directed to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end, but no State shall be permitted to select lieu lands in another State. The Secretary of the Interior shall accept on behalf of the United States title to any State-owned lands within or without the boundaries of a grazing district, and in exchange therefor issue patent to surveyed grazing district land not otherwise reserved or appropriated or unappropriated and unreserved surveyed public land; and in making such exchange the Secretary is authorized to patent to such State, land either of equal value or of equal acreage:

Provided, That no State shall select public lands in a grazing district in furtherance of any exchange unless the lands offered by the State in such exchange lie within such grazing district and the selected lands lie in a reasonably compact body which is so located as not to interfere with the administration or value of the remaining land in such district for grazing purposes as set forth in this chapter.

When an exchange is based on lands of equal acreage and the selected lands are mineral in character, the patent thereto shall contain a reservation of all minerals to the United States; and in making exchanges of equal acreage the Secretary of the Interior is authorized to accept title to offered lands which are mineral in character, with a mineral reservation to the State.

For the purpose of effecting exchanges based on lands of equal acreage the identification and area of unsurveyed school sections may be determined by protraction or otherwise. The selection by the State of lands in lieu of any such protracted school sections shall be a waiver of all of its right to this chapter.

(d) Before any such exchange under this section shall be effected, notice of the contemplated exchange, describing the lands involved, shall be published by the Secretary of the Interior once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in the same manner in some like newspaper published in any county in which may be situated any lands to be given in such exchange; lands conveyed to the United States under this chapter shall, upon acceptance of title, become public lands, and if located within the exterior boundaries of a grazing district they shall become a part of the district within the boundaries of which they are located: *Provided*, That either party to an exchange based upon equal value under this section may make reservations of minerals, easements, or rights of use. Where reservations are made in

lands conveyed either to or by the United States the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary. Where mineral reservations are made by the grantor in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who prospects for or acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon. No fee shall be charged for any exchange of land made under this chapter except one-half of the cost of publishing notice of a proposed exchange as herein provided. June 28, 1934, c. 865, §8, 48 Stat. 1272, as amended June 26, 1936, c. 842, Title I, §3, 49 Stat. 1976; June 19, 1948, c. 548, §1, 62 Stat. 533.

§315g—1. Addition of Lands Acquired Under Exchange Provisions of Section 315g to National Forest

Lands heretofore or hereafter acquired under section 315g of this title which are within the exterior boundaries of a national forest and which are determined by the Secretary of Agriculture to be suitable for administration as a part of the national forest may be set apart and reserved by the Secretary of the Interior by public land order as part of such national forest. Lands so set apart and reserved shall be subject to the laws, rules, and regulations applicable to lands set apart and reserved from the public domain within such national forest. Pub. L. 87—524, July 9, 1962, 76 Stat. 140.

§315h. Co-operation With Associations, Land Officials, and Agencies Engaged in Conservation or Propagation of Wild Life; Local Hearings on Appeals; Acceptance and Use of Contributions

The Secretary of the Interior shall provide, by suitable rules and regulations, for cooperation with local associations of stockmen, State land officials, and official State agencies engaged in conservation or propagation of wild life interested in the use of the grazing districts. The Secretary of the Interior shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department. The Secretary of the Interior shall also be empowered to accept contributions toward the administration, protection, and improvement of lands within or without the exterior boundaries of a grazing district, moneys so received to be covered into the Treasury as a special fund, which is hereby appropriated and made available until expended, as the Secretary of the Interior may direct, for payment of expenses incident to said administration, protection, and improvement, and for refunds to depositors of amounts contributed by them in excess of their share of the cost. June 28, 1934, c. 865, §9, 48 Stat. 1273, amended June 19, 1948, c. 548, §2, 62 Stat. 533.

§315i. Disposition of Moneys Received; Availability for Improvements

Except as provided in sections 315h and 315j of this title all moneys received under the authority of this chapter shall be deposited in the Treasury of the United States as miscellaneous receipts, but the following proportions of the moneys so received shall be distributed as follows: (a) 12½ per centum of the moneys collected as grazing fees under

section 315b of this title during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which the grazing districts producing such moneys are situated, to be expended as the State legislature of such State may prescribe for the benefit of the county or counties in which the grazing districts producing such moneys are situated: *Provided*, That if any grazing district is in more than one State or county, the distributive share to each from the proceeds of said district shall be proportional to its area in said district; (b) 25 per centum of all moneys collected under section 315m of this title during any fiscal year when appropriated by the Congress, shall be available until expended solely for the construction, purchase, or maintenance of range improvements; and 50 per centum of all moneys collected under said section during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which the lands producing such moneys are located, to be expended as the State legislature of such State may prescribe for the benefit of the county or counties in which the lands producing such moneys are located: *Provided*, That if any leased tract is in more than one State or county, the distributive share to each from the proceeds of said leased tract shall be proportional to its area in said leased tract. June 28, 1934, c. 865, §10, 48 Stat. 1273, amended June 26, 1936, c. 842, Title I, §4, 49 Stat. 1978; Aug. 6, 1947, c. 507, §2, 61 Stat. 790.

§315j. Appropriation of Moneys Received; Application of Public Land Laws to Indian Ceded Lands; Application for Mineral Title to Lands

When appropriated by Congress, 33⅓ per centum of all grazing fees received from each grazing district on Indian lands ceded to the United States for disposition under the public-land laws during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State

in which said lands are situated, to be expended as the State legislature may prescribe for the benefit of public schools and public roads of the county or counties in which such grazing lands are situated. And the remaining 66⅔ per centum of all grazing fees received from such grazing lands shall be deposited to the credit of the Indians pending final disposition under applicable laws, treaties, or agreements. The applicable public land laws as to said Indian ceded lands within a district created under this chapter shall continue in operation, except that each and every application for nonmineral title to said lands in a district created under this chapter shall be allowed only if in the opinion of the Secretary of the Interior the land is of the character suited to disposal through the Act under which application is made and such entry and disposal will not affect adversely the best public interest, but no settlement or occupation of such lands shall be permitted until ninety days after allowance of an application. June 28, 1934, c. 865, §4, 48 Stat. 1273, amended Aug. 6, 1947, c. 507, §3, 61 Stat. 791.

§315k. Cooperation With Governmental Departments; Coordination of Range Administration.

The Secretary of the Interior is hereby authorized to cooperate with any department of the Government in carrying out the purposes of this chapter and in the coordination of range administration, particularly where the same stock grazes part time in a grazing district and part time in a national forest or other reservation. June 28, 1934, c. 865, §12, 48 Stat. 1274.

§315l. Lands Under National Forest Administration.

The President of the United States is authorized to reserve by proclamation and place under national-forest administration in any State where national forests may be

created or enlarged by Executive order any unappropriated public lands lying within watersheds forming a part of the national forests which, in his opinion, can best be administered in connection with existing national-forest administration units, and to place under the Interior Department administration any lands within national forests, principally valuable for grazing, which, in his opinion, can best be administered under the provisions of this chapter: *Provided*, That such reservations or transfers shall not interfere with legal rights acquired under any public-land laws so long as such rights are legally maintained. Lands placed under the national-forest administration under the authority of this chapter shall be subject to all the laws and regulations relating to national forests, and lands placed under the Interior Department administration shall be subject to all public-land laws and regulations applicable to grazing districts created under authority of this chapter. Nothing in this section shall be construed so as to limit the powers of the President (relating to reorganizations in the executive departments) granted by sections 124 to 132 of Title 5. June 28, 1934, c. 865, §13, 48 Stat. 1274.

§315m. Lease of Isolated or Disconnected Tracts for Grazing; Preferences

The Secretary of the Interior is further authorized, in his discretion, where vagant, unappropriated, and unreserved lands of the public domain are so situated as not to justify their inclusion in any grazing district to be established pursuant to sections 315—315m, 315n, 315o and 315o—1 of this title, to lease any such lands for grazing purposes, upon such terms and conditions as the Secretary may prescribe: *Provided*, That preference shall be given to owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands, except that when such iso-

lated or disconnected tracts embrace seven hundred and sixty acres or less, the owners, homesteaders, lessees, or other lawful occupants of lands contiguous thereto or cornering thereon shall have a preference right to lease the whole of such tract, during a period of ninety days after such tract is offered for lease, upon the terms and conditions prescribed by the Secretary. *Provided further*, That when public lands are restored from a withdrawal, the Secretary may grant an appropriate preference right for a grazing lease, license, or permit to users of the land for grazing purposes under authority of the agency which had jurisdiction over the lands immediately prior to the time of their restoration. June 28, 1934, c. 865, § 15, 48 Stat. 1275, as amended June 26, 1936, c. 842, Title I, § 5, 49 Stat. 1978; May 28, 1954, c. 243, § 1, 68 Stat. 151.

§315m—1. Lease of State, County, or Privately Owned Lands; Period of Lease; Rental

The Secretary of the Interior in his discretion is authorized to lease at rates to be determined by him any State, county, or privately owned lands chiefly valuable for grazing purposes and lying within the exterior boundaries of a grazing district when, in his judgment, the leasing of such lands will promote the orderly use of the district and aid in conserving the forage resources of the public lands therein: *Provided*, That no such leases shall run for a period of more than ten years and in no event shall the grazing fees paid the United States for the grazing privileges on any of the lands leased under the provisions of this section be less than the rental paid by the United States for any such lands: *Provided further*, That nothing in this section shall be construed as authorizing the appropriation of any moneys except that moneys heretofore or hereafter appropriated for construction, purchase, and maintenance of range improvements within grazing districts, pursuant

to the provisions of sections 315i and 315j of this title, as amended, may be made additionally available by Congress for the leasing of land under this section and sections 315m—2 to 315m—4 of this title. June 23, 1938, c. 603, §1, 52 Stat. 1033.

§315m—2. Same; Administration of Leased Lands

The lands leased under sections 315m—1 to 315m—4 of this title shall be administered under the provisions of this chapter commonly known as the Taylor Grazing Act. June 23, 1938, c. 603, §2, 52 Stat. 1033.

§315m—3. Same; Availability of Contributions Received

Contributions received by the Secretary of the Interior under section 315h of this title, toward the administration, protection, and improvement of any district shall be additionally available for the leasing of lands under sections 315m—1 to 315m—4 of this title. June 23, 1938, c. 603, §3, 52 Stat. 1033.

§315m—4. Same; Disposition of Receipts; Availability for Leasing of Land

All moneys received by the Secretary of the Interior in the administration of leased lands as provided in section 315m—2 shall be deposited in the Treasury of the United States as miscellaneous receipts, but are hereby made available, when appropriated by the Congress, for the leasing of lands under sections 315m—1 to 315m—4 of this title and shall not be distributed as provided under sections 315i and 315j of this title. June 23, 1938, c. 603, §4, 52 Stat. 1033.

§315n. STATE POLICE POWER NOT ABRIDGED

Nothing in this chapter shall be construed as restricting the respective States from enforcing any and all statutes enacted for police regulation, nor shall the police power of the respective States be, by this chapter, impaired or restricted, and all laws heretofore enacted by the respective States or any thereof, or that may hereafter be enacted as regards public health or public welfare, shall at all times be in full force and effect: *Provided, however*, That nothing in this section shall be construed as limiting or restricting the power and authority of the United States. June 28, 1934, c. 865, §16, 48 Stat. 1275.

§315o—1. BOARD OF GRAZING DISTRICT ADVISORS; COMPOSITION; MEETINGS; DUTIES

In order that the Secretary of the Interior may have the benefit of the fullest information and advice concerning physical, economic, and other local conditions in the several grazing districts, there shall be an advisory board of local stockmen in each such district, the members of which shall be known as grazing district advisers. Each such board shall consist of not less than five nor more than twelve members, exclusive of wildlife representatives, one such representative to be appointed by the Secretary, in his discretion, to membership on each such board. Except for such wildlife representatives, the names of the members of each district advisory board shall be recommended to the Secretary by the users of the range in that district through an election conducted under rules and regulations prescribed by the Secretary. No grazing district adviser so recommended, however, shall assume office until he has been appointed by the Secretary and has taken an oath of office. The Secretary may, after due notice, remove any grazing district adviser from office if in his opinion such removal would be for the good of the service.

(b) Each district advisory board shall meet at least once annually at a time to be fixed by the Secretary of the Interior, or by such other officer to whom the Secretary may delegate the function of issuing grazing permits, and at such other times as its members may be called by such officer. Each board shall offer advice and make a recommendation on each application for such a grazing permit within its district: *Provided*, That in no case shall any grazing district adviser participate in any advice or recommendation concerning a permit, or an application therefor, in which he is directly or indirectly interested. Each board shall further offer advice or make recommendations concerning rules and regulations for the administration of this chapter, the establishment of grazing districts and the modification of the boundaries thereof, the seasons of use and carrying capacity of the range, and any other matters affecting the administration of this chapter within the district. Except in a case where in the judgment of the Secretary an emergency shall exist, the Secretary shall request the advice of the advisory board in advance of the promulgation of any rules and regulations affecting the district. June 28, 1934, c. 865, §18, as added July 14, 1939, c. 270, 53 Stat. 1002, and amended 1946 Reorg. Plan No. 3, §403, eff. July 16, 1946, 11 F. R. 7876, 60 Stat. 1100.

§315o—2. Animals and Equipment for Field Employees

The Secretary of the Interior may require field employees of the Bureau of Land Management to furnish horses and miscellaneous equipment necessary for the performance of their official work and may provide at Government expense forage, care, and housing for such animals and equipment. Dec. 18, 1942, c. 769, 56 Stat. 1067; 1946 Reorg. Plan No. 3, §403, eff. July 16, 1946; 11 F. R. 7876, 60 Stat. 1100.

§315p. EXCHANGE OF LANDS; ISSUANCE OF PATENT SUBJECT TO OUTSTANDING LEASE

The Secretary of the Interior in adjudicating State exchanges, under section 315g of this title, involving lands embraced in outstanding leases under section 315m of this title issued prior to the filing of the State exchange application, is hereby authorized upon the request of any State to issue patent to the State, subject to such outstanding lease: *Provided*, That the United States shall not by reason of the issuance of any such patents be required to account to the State for any money due and collected prior thereto as rent for any part of the then-current annual rental period except as was, on August 24, 1937, provided by law. Aug. 24, 1937, c. 744, 50 Stat. 748.

§315q. WITHDRAWALS OF LANDS FOR WAR OR NATIONAL DEFENSE PURPOSES; PAYMENTS FOR CANCELLATION OF PERMITS OR LICENSES

Whenever use for war or national defense purposes of the public domain or other property owned by or under the control of the United States prevents its use for grazing, persons holding grazing permits or licenses and persons whose grazing permits or licenses have been or will be canceled because of such use shall be paid out of the funds appropriated or allocated for such project such amounts as the head of the department or agency so using the lands shall determine to be fair and reasonable for the losses suffered by such persons as a result of the use of such lands for war or national defense purposes. Such payments shall be deemed payment in full for such losses. Nothing herein contained shall be construed to create any liability not now existing against the United States. July 9, 1942, c. 500, 56 Stat. 654, amended May 28, 1948, c. 353, §1, 62 Stat. 277.

2. The Taylor Grazing Act, as Originally Enacted (Act of June 28, 1934, c. 865, 48 Stat. 1269)

[CHAPTER 865.]

AN ACT

To stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and or to modify the boundaries thereof, not exceeding in the aggregate an area of eighty million acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: *Provided*, That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. Nothing in this Act shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this Act, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of

any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction. Whenever any grazing district is established pursuant to this Act, the Secretary shall grant to owners of land adjacent to such district, upon application of any such owner, such rights-of-way over the lands included in such district for stock-driving purposes as may be necessary for the convenient access by any such owner to marketing facilities or to lands not within such district owned by such person or upon which such person has stock-grazing rights. Neither this Act nor the Act of December 29, 1916 (39 Stat. 862; U.S.C., title 43, secs. 291 and following), commonly known as the "Stock Raising Homestead Act", shall be construed as limiting the authority or policy of Congress or the President to include in national forests public lands of the character described in section 24 of the Act of March 3, 1891 (26 Stat. 1103; U.S.C., title 16, sec. 471), as amended, for the purposes set forth in the Act of June 4, 1897 (30 Stat. 35; U.S.C., title 16, sec. 475), or such other purposes as Congress may specify. Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given, at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held: *Provided, however*, That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement. Nothing in this Act shall be construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any State, or as vesting in any permittee any

right whatsoever to interfere with hunting or fishing within a grazing district.

SEC. 2. The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of the foregoing section, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; and the Secretary of the Interior is authorized to continue the study of erosion and flood control and to perform such work as may be necessary amply to protect and rehabilitate the areas subject to the provisions of this Act, through such funds as may be made available for that purpose; and any willful violation of the provisions of this Act or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500.

SEC. 3. That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time: *Provided*, That grazing permits shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located.

Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is hereby authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists: *Provided further*, That nothing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the

issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the lands.

SEC. 4. Fences, wells, reservoirs, and other improvements necessary to the care and management of the permitted livestock may be constructed on the public lands within such grazing districts under permit issued by the authority of the Secretary, or under such cooperative arrangement as the Secretary may approve. Permittees shall be required by the Secretary of the Interior to comply with the provisions of law of the State within which the grazing district is located with respect to the cost and maintenance of partition fences. No permit shall be issued which shall entitle the permittee to the use of such improvements constructed and owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements to be determined under rules and regulations of the Secretary of the Interior. The decision of the Secretary in such cases is to be final and conclusive.

SEC. 5. That the Secretary of the Interior shall permit, under regulations to be prescribed by him, the free grazing within such districts of livestock kept for domestic purposes; and provided that so far as authorized by existing law or laws hereinafter enacted, nothing herein contained shall prevent the use of timber, stone, gravel, clay, coal, and other deposits by miners, prospectors for mineral, bona fide settlers and residents, for firewood, fencing, buildings, mining, prospecting, and domestic purposes within areas subject to the provisions of this Act.

SEC. 6. Nothing herein contained shall restrict the acquisition, granting or use of permits, or rights-of-way within grazing districts under existing law; or ingress or egress over the public lands in such districts for all proper and lawful purposes; and nothing herein contained shall restrict prospecting, locating, developing, mining, entering,

leasing, or patenting the mineral resources of such districts under law applicable thereto.

SEC. 7. That the Secretary is hereby authorized, in his discretion, to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area. Such lands shall not be subject to settlement or occupation as homesteads until after same have been classified and opened to entry after notice to the permittee by the Secretary of the Interior, and the lands shall remain a part of the grazing district until patents are issued therefor, the homesteader to be, after his entry is allowed, entitled to the possession and use thereof: *Provided*, That upon the application of any person qualified to make homestead entry under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract not exceeding three hundred and twenty acres in any grazing district to be classified, and such application shall entitle the applicant to a preference right to enter such lands when opened to entry as herein provided.

SEC. 8. That where such action will promote the purposes of the district or facilitate its administration, the Secretary is authorized and directed to accept on behalf of the United States any lands within the exterior boundaries of a district as a gift, or, when public interests will be benefited thereby, he is authorized and directed to accept on behalf of the United States title to any privately owned lands within the exterior boundaries of said grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining

State nearest the base lands: *Provided*, That before any such exchange shall be effected, notice of the contemplated exchange, describing the lands involved, shall be published by the Secretary of the Interior once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in the same manner in some like newspaper published in any county in which may be situated any lands to be given in such exchange; lands conveyed to the United States under this Act shall, upon acceptance of title, become public lands and parts of the grazing district within whose exterior boundaries they are located: *Provided further*, That either party to an exchange may make reservations of minerals, easements, or rights of use, the values of which shall be duly considered in determining the values of the exchanged lands. Where reservations are made in lands conveyed to the United States, the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary by the Secretary of the Interior. Where mineral reservations are made in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the mining and removal of the minerals therefrom and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon. Upon application of any State to exchange lands within or without the boundary of a grazing district the Secretary of the Interior is authorized and directed, in the manner provided for the exchange of privately owned lands in this section, to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end, but no State shall be permitted to select lieu lands in another State.

SEC. 9. The Secretary of the Interior shall provide, by suitable rules and regulations, for cooperation with local associations of stockmen, State land officials, and official State agencies engaged in conservation or propagation of wild life interested in the use of the grazing districts. The Secretary of the Interior shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department. The Secretary of the Interior shall also be empowered to accept contributions toward the administration, protection, and improvement of the district, moneys so received to be covered into the Treasury as a special fund, which is hereby appropriated and made available until expended, as the Secretary of the Interior may direct, for payment of expenses incident to said administration, protection, and improvement, and for refunds to depositors of amounts contributed by them in excess of their share of the cost.

SEC. 10. That, except as provided in sections 9 and 11 hereof, all moneys received under the authority of this Act shall be deposited in the Treasury of the United States as miscellaneous receipts, but 25 per centum of all moneys received from each grazing district during any fiscal year is hereby made available, when appropriated by the Congress, for expenditure by the Secretary of the Interior for the construction, purchase, or maintenance of range improvements, and 50 per centum of the money received from each grazing district during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which said grazing district is situated, to be expended as the State legislature may prescribe for the benefit of the county or counties in which the grazing district is situated: *Provided*, That if any grazing district is in more than one State or county, the distributive share to each from the proceeds of said district shall be proportional to its area therein.

SEC. 11. That when appropriated by Congress, 25 per centum of all moneys received from each grazing district on Indian lands ceded to the United States for disposition under the public-land laws during any fiscal year is hereby made available for expenditures by the Secretary of the Interior for the construction, purchase, or maintenance of range improvements; and an additional 25 per centum of the money received from grazing during each fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which said lands are situated, to be expended as the State legislature may prescribe for the benefit of public schools and public roads of the county or counties in which such grazing lands are situated. And the remaining 50 per centum of all money received from such grazing lands shall be deposited to the credit of the Indians pending final disposition under applicable laws, treaties, or agreements. The applicable public land laws as to said Indian ceded lands within a district created under this Act shall continue in operation, except that each and every application for nonmineral title to said lands in a district created under this Act shall be allowed only if in the opinion of the Secretary of the Interior the land is of the character suited to disposal through the Act under which application is made and such entry and disposal will not affect adversely the best public interest, but no settlement or occupation of such lands shall be permitted until ninety days after allowance of an application.

SEC. 12. That the Secretary of the Interior is hereby authorized to cooperate with any department of the Government in carrying out the purposes of this Act, and in the coordination of range administration, particularly where the same stock grazes part time in a grazing district and part time in a national forest or other reservation.

SEC. 13. That the President of the United States is authorized to reserve by proclamation and place under

national-forest administration in any State where national forests may be created or enlarged by Executive order any unappropriated public lands lying within watersheds forming a part of the national forest which, in his opinion, can best be administered in connection with existing national-forest administration units, and to place under the Interior Department administration any lands within national forests, principally valuable for grazing, which, in his opinion, can best be administered under the provisions of this Act: *Provided*, That such reservations or transfers shall not interfere with legal rights acquired under any public-land laws so long as such rights are legally maintained. Lands placed under the national-forest administration under the authority of this Act shall be subject to all the laws and regulations relating to national forests, and lands placed under the Interior Department administration shall be subject to all public-land laws and regulations applicable to grazing districts created under authority of this Act. Nothing in this section shall be construed so as to limit the powers of the President (relating to reorganizations in the executive departments) granted by title 4 of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved March 3, 1933.

SEC. 14. That section 2455 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 2455. Notwithstanding the provisions of section 2357 of the Revised Statutes (U.S.C., title 43, sec. 678) and of the Act of August 30, 1890 (26 Stat. 391), it shall be lawful for the Secretary of the Interior to order into market and sell at public auction, at the land office of the district in which the land is situated, for not less than the appraised value, any isolated or disconnected tract or parcel of the public domain not exceeding seven hundred and sixty acres which, in his judgment, it would be proper to expose for

sale after at least thirty days' notice by the land office of the district in which such land may be situated: *Provided*, That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price, and where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an equitable division of the land among such applicants, but in no case shall the adjacent land owner or owners be required to pay more than three times the appraised price: *Provided further*, That any legal subdivisions of the public land, not exceeding one hundred and sixty acres, the greater part of which is mountainous or too rough for cultivation, may, in the discretion of the said Secretary, be ordered into the market and sold pursuant to this section upon the application of any person who owns land or holds a valid entry of lands adjoining such tract, regardless of the fact that such tract may not be isolated or disconnected within the meaning of this section: *Provided further*, That this section shall not defeat any valid right which has already attached under any pending entry or location. The word 'person' in this section shall be deemed to include corporations, partnerships, and associations."

SEC. 15. The Secretary of the Interior is further authorized in his discretion, where vacant, unappropriated, and unreserved lands of the public domain are situated in such isolated or disconnected tracts of six hundred and forty acres or more as not to justify their inclusion in any grazing district to be established pursuant to this Act, to lease any such lands to owners of lands contiguous thereto for grazing purposes, upon application therefor by any such owner, and upon such terms and conditions as the Secretary may prescribe.

SEC. 16. Nothing in this Act shall be construed as restricting the respective States from enforcing any and all statutes enacted for police regulation, nor shall the police power of the respective States be, by this Act, impaired or restricted, and all laws heretofore enacted by the respective States or any thereof, or that may hereafter be enacted as regards public health or public welfare, shall at all times be in full force and effect: *Provided, however*, That nothing in this section shall be construed as limiting or restricting the power and authority of the United States.

Approved, June 28, 1934.

3. Public Law 85-337, 72 Stat. 27; 43 U. S. C. A. §156 (in part)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding any other provisions of law, except in time of war or national emergency hereafter declared by the President or the Congress, on and after the date of enactment of this Act the provisions hereof shall apply to the withdrawal and reservation for, restriction of, and utilization by, the Department of Defense for defense purposes of the public lands of the United States, including public lands in the Territories of Alaska and Hawaii:

* * *

SEC. 2. No public land, water, or land and water area shall, except by Act of Congress, hereafter be (1) withdrawn from settlement, location, sale, or entry for the use of the Department of Defense for defense purposes; (2) reserved for such use; or (3) restricted from operation of the mineral leasing provisions of the Outer Continental Shelf Lands Act (67 Stat. 462), if such withdrawals, reservation, or restriction would result in the withdrawal, reservation, or restriction of more than five thousand acres in the aggregate for any one defense project or facility of the Department of Defense since the date of enactment of this Act or since the last previous Act of Congress which withdrew, reserved, or restricted public land, water, or land and water area for that project or facility, whichever is later.

* * *

SEC. 5. The Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended, is hereby further amended by revising section 3 (d) to read as follows:

"(d) The term 'property' means any interest in property except (1) the public domain; lands reserved or dedicated for national forest or national park purposes; miner-

als in lands or portions of lands withdrawn or reserved from the public domain which the Secretary of the Interior determines are suitable for the disposition under the public land mining and mineral leasing laws; and lands withdrawn or reserved from the public domain except lands or portions of lands so withdrawn or reserved which the Secretary of the Interior, with the concurrence of the Administrator, determines are not suitable for return to the public domain for disposition under the general public-land laws because such lands are substantially changed in character by improvements or otherwise; (2) naval vessels of the following categories: Battleships, cruisers, aircraft carriers, destroyers, and submarines; and (3) records of the Federal Government."

SEC. 6. All withdrawals or reservations of public lands for the use of any agency of the Department of Defense, except lands withdrawn or reserved, specifically as naval petroleum, naval oil shale, or naval coal reserves, heretofore or hereafter made by the United States, shall be deemed to be subject to the condition that all minerals, including oil and gas, in the lands so withdrawn or reserved are under the jurisdiction of the Secretary of the Interior and there shall be no disposition of, or exploration for, any minerals in such lands except under the applicable public land mining and mineral leasing laws: *Provided*, That no disposition of, or exploration for, any minerals in such lands shall be made where the Secretary of Defense, after consultation with the Secretary of the Interior, determines that such disposition or exploration is inconsistent with the military use of the lands so withdrawn or reserved.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 653

W. DALTON LARUE, SR., ET AL., PETITIONERS

v.

STEWART L. UDALL, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR, AND NORTH AMERICAN AVIATION, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

OPINION BELOW

The court of appeals' opinion (Pet. App. 20a–34a) is reported at 324 F. 2d 428. The district court issued no opinion.

JURISDICTION

The judgment below was entered on October 3, 1963 (Pet. App. 35a). The petition for certiorari was filed December 2, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under Section 8(b) of the Taylor Grazing Act, the Secretary of the Interior was authorized

in this case to exchange public land in one grazing district for privately owned land in another.

2. Whether, under the Taylor Grazing Act, the Administrative Procedure Act or the due process clause of the Fifth Amendment, the holders of licenses to graze on the lands being surrendered have a right to present evidence at a hearing as a condition precedent to such an exchange.

3. Whether Section 3 of the Taylor Grazing Act precludes such an exchange where the licensees have pledged their ranch and range rights as security for a mortgage.

STATUTE INVOLVED

The pertinent portions of Sections 3, 8, and 9 of the Taylor Grazing Act, 43 U.S.C. 315b, 315g, and 315h, are set forth in the Appendix, *infra*, pp. 13–15. The Act is set forth in its entirety at Pet. App. 1a–16a.

STATEMENT

This action was brought to enjoin the Secretary of Interior from effecting an exchange of public land under Section 8(b) of the Taylor Grazing Act (43 U.S.C. 315g(b)). The relevant facts may be summarized as follows:

In 1958, North American Aviation, Inc., to consolidate and expand its facilities for testing and developing rocket engines and fuels (J.A. 83–87),[1] filed an application to exchange some 20,000 acres which it owned in Winnemucca (Nevada) Grazing District No. 2 for 10,000 acres of public land in Carson City (Nevada) Grazing District No. 3 (Pet. App. 21a).

[1] Citation is to the joint appendix in the court of appeals which is on file with Clerk of the Court.

The Winnemucca lands had an appraised value of $90,100; the Carson City public lands were appraised at $86,400 (*ibid.*).

Petitioners have since 1953 owned a 1,600-acre ranch in the Carson City area and have used most of the 10,000 acres of public lands here involved for grazing their cattle under a license issued pursuant to the Taylor Grazing Act (43 U.S.C. 315a; see J.A. 237). The ranch, including their range rights, is subject to a deed of trust and note upon which a balance of $8,700 remains unpaid (J.A. 187–191).

Petitioners protested the exchange (J.A. 67–68) on grounds that it was not authorized by Section 8(b) of the Grazing Act (*infra*, p. 14). On November 2, 1960, the local land office approved the exchange (J.A. 50–51). On appeal by petitioners, the Bureau of Land Management (J.A. 58–66), and in turn the Secretary of the Interior (J.A. 24–32), affirmed. The Secretary found that North American sought the exchange for the purpose of carrying "on its program of testing and development in fields in which the Federal Government and the public generally have an interest" (J.A. 23, 26). The Secretary then ruled (J.A. 27)—

> * * * that the benefit to the public interests, which is the criterion of the statute, need not be related exclusively to conservation of Federal grazing resources nor need it be shown that a proposed exchange will promote range management.

Accordingly, he determined "that consummation of the proposed exchange would be in the public interest"

(J.A. 31). As additional support for his decision, the Secretary found that (J.A. 31)—

> * * * acquisition of the offered lands would block out holdings of public lands and would facilitate the administration and management of the area for grazing purposes.

Petitioners brought this action to enjoin execution of the exchange (J.A. 3–20). The district court granted summary judgment in favor of the Secretary (J.A. 239), and the court of appeals affirmed. It held that the Secretary correctly construed Section 8(b) as permitting exchanges when the "public interest" to be benefited is the interest in national defense, but that even under petitioners' narrow view that "public interests" as used in Section 8(b) is limited to grazing purposes, the exchange was proper (Pet. App. 23a–24a).[2] The court rejected petitioners' argument that a hearing was required by the Administrative Procedure Act or the Fifth Amendment on grounds that the Taylor Grazing Act does not require a hearing before an exchange (Pet. App. 26a–27a) and that the Fifth Amendment contention (Pet. App. 26a)—

> disregards the provision of § 3 of the Act (43 U.S.C. § 315b) that "* * * So far as consistent with the purposes and provisions of this chapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance

[2] Chief Judge Bazelon, concurring (Pet. App. 27a–34a), would have affirmed on the Secretary's alternative ground that the exchange would benefit grazing interests.

> of a permit pursuant to the provisions of this chapter, shall not create any right, title, interest, or estate in or to the lands." The command of Congress that grazing privileges shall be adequately safeguarded "so far as consistent with the purposes and provisions of this chapter" does not mean that a grazing permit is to prevent the Government's exercise of the right of exchange, which is "one of the provisions of this chapter."

Finally, the court held that since Section 3 specifically provides that permits do not create a vested interest against the United States, the existence of a mortgage on the petitioners' ranch did not prevent the United States from exchanging the public lands (Pet. App. 25a).

ARGUMENT

I. The court properly affirmed the Secretary's determination that the "public interests will be benefited" by the exchange. As stated by the court (Pet. App. 23a), the term "public interests" in Section 8(b) is not limited in any way by the words of the Act, nor can any limitation properly be implied from the remainder of the statute. Indeed, the contrary is true. A reading of the entire Section 8 makes it clear that "public interests" is to be broadly construed. Thus, Section 8(a) specifies that a benefit to the grazing district or public land management must be shown to warrant accepting a gift of land under this section. On the other hand, Section 8(c) does not require any benefit to be shown when a State applies to exchange lands. Section 8(b) requiring

that "public interests be benefited" is quite apparently a midway position authorizing any exchange for privately owned lands which the Secretary finds to be in the general public interest.

Petitioners' contention that the authorization is limited to exchanges which will benefit grazing districts is inconsistent with the reach of the statute. Thus, Section 8(b) authorizes the exchange of public and private lands which are not within any grazing district as well as the exchange of public lands within a grazing district for private lands which are not. Obviously, Congress, which in Section 8(a) carefully limited the authority to "action [which] will promote the purposes of a district or facilitate the administration of the public lands," intended to impose a broader standard here.

Under the circumstances, the Secretary quite reasonably construed "public interests" to include the interest in national defense. Accordingly, his construction is entitled to stand. As the Supreme Court stated in *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153–154:

> To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. The "reviewing court's function is limited." All that is needed to support the Commission's interpretation is that it has "warrant in the record" and a "reasonable basis in law."

See also *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125; *Gray* v. *Powell*, 314 U.S. 402; *Securities Comm'n* v. *Chenery Corp.*, 332 U.S. 194. The principle established by the foregoing cases is even more appropriately applied here where we are concerned with the management of the public lands for which the Secretary has been given plenary authority, rather than deciding a dispute between individuals arising under the regulatory authority of an administrative agency. *Best* v. *Humboldt Mining Co.*, 371 U.S. 334.

There is no basis for petitioners' repeated assertions (Pet. 7, 8, 11, 12) that the Secretary is claiming plenary authority to dispose of the public lands without regard to the will of Congress. This is an exchange, not a sale, and, as provided for specifically by the Taylor Grazing Act, privately held land of equal value is to be received. Other statutes referred to by petitioners (Pet. 11–13, 17a–19a), which provide for disposition of public lands by sale or otherwise, are irrelevant, as are statutes for withdrawals as well as congressional action or inaction in refusing to extend the disposition powers of the Secretary in other fields.

Finally, the Secretary found that the acquisition of the private lands would consolidate holdings of public lands in the Winnemucca District and facilitate the administration and management of the area for grazing purposes. Thus, as the court of appeals unanimously agreed (Pet. App. 24a, 28a), the exchange is proper even if Section 8(b) has the limited scope for which petitioners contend.

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2. Neither the Taylor Grazing Act, the Administrative Procedure Act nor the Fifth Amendment requires a hearing as a condition precedent to an exchange of public for private lands under Section 8(b). The Administrative Procedure Act requires a hearing only where the agency statute requires one and the Taylor Grazing Act does not require hearings on proposed exchanges. Specifically, it provides (Section 8(d), Pet. 9a–10a):

> Before any such exchange under this section shall be effected notice of the contemplated exchange, describing the lands involved, shall be published * * *.

This procedure was followed and petitioners have presented their objections and information in support thereof to the department at all stages in the proceedings. Thus, in a real sense they have been "heard."

Essentially, petitioners argue (Pet. 16–17) that as holders of grazing licenses they are entitled to a hearing under Section 9 of the Grazing Act which states that the Secretary "shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge" of the grazing district. However, this provision has never been so applied, and the statutory framework indicates that it should not be. Thus, the Act provides for the establishment of grazing districts on vacant public land "pending its final disposal" (43 U.S.C. 315) and the grant of permits to graze livestock on such districts (43 U.S.C. 315b). The Secretary is given plenary authority to reclassify such lands found

to be "more valuable or suitable for any other use" (43 U.S.C. 315f) as well as to exchange these lands. The Act specifically provides that "the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the lands" (43 U.S.C. 315b). Since 1934, when the statute was adopted, the Department has interpreted these interrelated provisions as authorizing the Secretary to exchange or reclassify public lands devoted to grazing without holding a hearing, whether or not grazing permits had been issued. The temporary nature of the commitment of lands to grazing, the limited status which Congress has assigned to the permit, and the broad discretion given the Secretary in making decisions to reclassify or exchange such lands confirm the correctness of this interpretation.[3]

The limited nature of the grazing permits[4] also answers petitioners' contention that the due process

[3] The Secretary has construed Section 9 to require the adoption of procedures for local hearings in those cases where hearings are specifically required by other provisions of the statute (i.e., Section 1, 43 U.S.C. 315, requires a hearing before grazing districts are created), and on matters "that arise in the administration of grazing districts." *M. C. Steele* v. *Ruby Rector Kirby*, 60 I.D. 389, 394; 43 CFR 161.9(d), 161.10. The court of appeals recognized this as the proper interpretation of the "local hearing" provision of the Act (Pet. App. 26a).

[4] It is clear from Section 3 of the Act (43 U.S.C. 315b) that possession of a permit does not give the holder any vested right to the lands. *Osborne* v. *United States*, 145 F. 2d 892 (C.A. 9); *United States* v. *Cox*, 190 F. 2d 293 (C.A. 10), certiorari denied, 342 U.S. 867; *Oman* v. *United States*, 179 F. 2d 738 (C.A. 10). Section 3 is simply expressive of the settled law at the time the Act was passed that the fact that the United

clause forbids approval of the exchange without an adversary hearing on the termination of their permits. Indeed, petitioners concede that they have no "right, title and interest in and to the public domain as would entitle them to just compensation" (Pet. 18). Yet they urge that they have "a right to use the public domain," which amounts to a property right which cannot be withdrawn without a hearing. How they leap the gap is not clear. Neither *Red Canyon Sheep Co.* v. *Ickes*, 98 F. 2d 308 (C.A. D.C.), nor *McNeil* v. *Seaton*, 281 F. 2d 931, 934 (C.A. D.C.), cited by petitioners (Pet. 18), supports them.[5] Accordingly, the Secretary was fully justified in following prior departmental decisions denying an evidentiary hearing as part of the exchange procedure.

3. The short answer to petitioners' contention (Pet. 19–21) that the pledge of the ranch as partial security for a loan precludes the exchange is that the provision of the Act on which they rely (43 U.S.C. 315b) applies only to the renewal of permits and the establishment of preferences between permittees and applicants for permits. It makes no reference to exchanges. Moreover, as the court of appeals said,

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States had allowed its public lands to be used for grazing "did not confer any vested right on the complainant, nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes." *Light* v. *United States*, 220 U.S. 523, 535.

[5] *Red Canyon* holds that a Taylor Grazing Act licensee has standing to question in court the legality of a proposed exchange. But standing to sue cannot be converted into a constitutional right to the land. *McNeil* involved the question of awarding preferential rights to one applicant rather than another and is accordingly inapposite here.

such a construction would be directly contrary to the provisions of Section 3 that a permit "shall not create any right, title, interest, or estate in or to the lands." It should also be noted that this contention was not made at any stage of the administrative proceedings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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JANUARY 1964.

APPENDIX

1. Section 3 of the Taylor Grazing Act, 43 U.S.C. 315b, provides in pertinent part:

> The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees * * *. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. * * * So far as consistent with the purposes and provisions of this chapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions

of this chapter shall not create any right, title, interest, or estate in or to the lands. * * *

2. Section 8 of the Act, 43 U.S.C. 315g, provides in pertinent part:

> (a) Where such action will promote the purposes of a district or facilitate the administration of the public lands, the Secretary is authorized to accept on behalf of the United States any lands within or without the exterior boundaries of a grazing district as a gift.
>
> (b) When public interests will be benefited thereby the Secretary is authorized to accept on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands.
>
> (c) Upon application of any State to exchange lands within or without the boundaries of a grazing district the Secretary of the Interior shall, and is directed to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end, but no State shall be permitted to select lieu lands in another State. The Secretary of the Interior shall accept on behalf of the United States title to any State-owned lands within or without the boundaries of a grazing district, and in exchange therefor issue patent to surveyed grazing district land not otherwise reserved or appropriated or unappropriated and unreserved surveyed public land; and in making such exchange the Secretary is authorized to patent to such State, land either of equal value or of equal acreage; *Provided,* That no State shall select public lands in a grazing dis-

trict in furtherance of any exchange unless the lands offered by the State in such exchange lie within such grazing district and the selected lands lie in a reasonably compact body which is so located as not to interfere with the administration or value of the remaining land in such district for grazing purposes as set forth in this chapter.

* * * * *

(d) Before any such exchange under this section shall be effected, notice of the contemplated exchange, describing the lands involved, shall be published by the Secretary of the Interior * * *.

3. Section 9 of the Act, 43 U.S.C. 315h, provides in pertinent part:

* * * The Secretary of the Interior shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department. * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 653

W. DALTON LARUE, SR. and JUANITA S. LARUE,
Petitioners,

v.

STEWART L. UDALL, individually and as Secretary of the Interior, and NORTH AMERICAN AVIATION, INC.,
Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondents distort the meaning of the Taylor Grazing Act, the intent of Congress and the nature and significance of the private land exchange here challenged. This Reply is particularly prompted by the fact that, in our view, the Solicitor General, inadvertently, may have been less than candid with the Court.

ARGUMENT

1. The Solicitor can hardly be serious in suggesting (Brief, p. 7), that the scope of authority which Congress intended to confer upon the Secretary in enacting Section 8b must be determined without even a glance at Congressional public land policy. He brands as "irrelevant" the historical reluctance of Congress to sanction broad disposals of the public domain, as evidenced both by statutes adopted and proposals unsuccessfully pressed upon it.

In dismissing this evidence of the Congressional will, which appears to be painfully relevant, the Solicitor seeks to distinguish this case since it involves a land exchange and not a sale or withdrawal. Whether public land is sold for cash at fair market value or exchanged for land of equal monetary value is hardly a meaningful distinction; the fact is that public land is being disposed of. The Interior Department, more candid in seeking legislation than as respondent before this Court, has freely acknowledged that it seeks to dispose of public domain to national defense industries and has chosen the private land exchange as a "roundabout" method of effecting a disposition for which it lacks, and to date has been denied, direct statutory authority (Petition, p. 13).[1] In seeking new legislation, including the amendment of Section 8b,

[1] Assistant Secretary Carver recently advised Congress that industrial firms whose activities are defense oriented have been compelled to "resort" to the exchange procedure as a "protracted and tortuous alternative" since existing laws present "formidable, if not impossible obstacles" (See Hearings before a Subcommittee of the House Committee on Interior and Insular Affairs, *Public Lands Review*, Ser. 11, Part 1—*Use and Disposal of Public Lands*, at page 10).

the Interior Department recognizes that it seeks authority to dispose of the public domain more freely. The method chosen does not change the fact that land is to be disposed of.

Neither respondent even attempts to grapple with the fact that Congress has specifically required that its prior approval be obtained and that compensation for lost grazing rights be paid when public lands are temporarily withdrawn from grazing districts because of a need by governmental agencies or their contractors to utilize these lands for national defense purposes (43 U.S.C. 315q; 43 U.S.C. 156). These facts are not consistent with the Secretary's declaration that Congress has given him *carte blanche* to alienate the public domain to private parties for similar purposes via the exchange route.

The meaning of the term "public interests" in Section 8 of the Act presents a fundamental question as to nature and scope of a Congressional grant of authority. Such questions are for the Courts to resolve, particularly when the issue presented is the scope of an agency's jurisdiction. *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 130-31 (1944); *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946). The Government's reliance on *Unemployment Compensation Commission* v. *Aragan*, 329 U.S. 143 (1946) is misplaced. This case does not involve the specific application of a broad statutory term to a particular fact situation. The Secretary is not asked here to give a "practical administrative construction" to a quasi-technical term which can best be made by bureau specialists in the "usual administrative routine." *Gray* v. *Powell*, 314 U.S. 402, 411-12 (1941); *Power Reaction Development Co.* v. *International Union of*

Electrical, Radio and Machine Workers, 367 U.S. 396, 408 (1961).

Both the Government and North American urge that the Secretary has plenary power to exchange lands under Section 8b because the authority given him by Section 8a to accept gifts for the benefit of the Government is supposedly more circumscribed. Neither respondent attempts to come to terms with Judge Bazelon's cogent treatment of that contention.[2]

2. The Government argues that petitioners lack such an interest as would entitle them to a hearing since Congress allegedly (a) has provided for merely a temporary commitment of the public domain to grazing "pending its final disposal" and (b) has given the Secretary plenary authority to reclassify lands more valuable for any other use (Brief, pp. 8-9).

Surely the Solicitor must know that the phrase "final disposal" in Section 1 of the Act refers to the ultimate

[2] "The Secretary argues that where Congress wished to consider only grazing interests, it said so. For this proposition, he cites § 8(a), dealing with the acceptance of gift lands, which requires the specific showing that the acquisition will "promote the purposes of" a district or facilitate the administration of the public lands." But I do not think the more general language in § 8(b) was intended to allow the Secretary to go beyond grazing interests for his standards. Rather, it indicates that in an exchange of lands, there will be more than one factor to consider under the heading of grazing interests. Thus where the Government is conveying land as well as receiving land, it must consider the effect of the transaction not only on administration of the grazing district of the offered land, but also its effect on administration of the grazing district of the selected land and on the interests of grazing licensees of the land to be conveyed. [footnote reference omitted]. While offered land might meet the required standards, the detriment involved in giving up the selected lands might outweigh the benefit." (Excerpt from concurring opinion of chief Judge Bazelon, Petition, pp. 31a-32a).

disposition of the public lands *by Congress to the States*, an ultimate objective long sought by members of Congress from Western states. *See 78 Cong. Rec. 11145-46 (1934) and particularly the remarks of Senator O'Mahoney.* The phrase hardly indicates that the Secretary is authorized to grant temporary grazing rights before *he* proceeds to effect a far-reaching ultimate disposition of the public domain to private parties. Indeed, both the House and Senate Reports made it clear that the Taylor Act makes *no* disposition of the public domain (Petition, p. 9).

Nor does the reclassification authority granted in Section 7 provide any justification for the Secretary's alienation of the public domain. That provision provides for reclassifications as a condition precedent "*for disposal* in accordance with such classification *under applicable public-land laws.*" (emphasis supplied) Here, there is no public land law other than Section 8b the provision invoked by the Secretary—which would provide a basis for the attempted exchange. *Red Canyon Sheep Company* v. *Ickes*, 98 F. 2d 308, 324 (D.C. Cir., 1938).

The Solicitor is puzzled that petitioners claim the protections of due process while conceding that they are not constitutionally entitled to just compensation for the loss of grazing rights. That the due process and just compensation provisions of the Fifth Amendment constitute separate and different protections should come as no surprise. *Cf. Grahams Case*, 2 Ct. Cl. 327 (1866). The Courts have long held that the Government may not violate due process and fundamental principles of fairness in withdrawing a privilege or license bestowed by it which permits the conduct of private economic activity. (e.g. *see* Petition,

pp. 17-18). That conclusion has been reached despite the obvious fact that such a license or privilege is not guarded by the just compensation clause.

The need for an evidentiary hearing is underscored by North American's sharply conflicting Counter-Statement of the case. Moreover, the protections of an APA type hearing[3] conducted by an independent examiner are particularly necessary in a case such as this where the responsible administrative officials have been subjected to an extraordinary and overwhelming barrage of communications from political figures seeking approval of the North American's exchange applications (See J.A. 211-15).

Contrary to North American's assertion (Brief, p. 7), the "private" administrative file from which petitioners were denied access consisted not only of allegedly privileged intra-bureau memoranda but also of memoranda concerning *ex parte* conversations with North American (J.A. 187). Petitioners were told that further requests for access to such material would be considered provided their request "discloses the manner in which those documents would be relevant to the interest of your clients." (J.A. 187). This condition amounted to an effective denial of disclosure as petitioners obviously were unable to specify the relevancy of documents whose nature and contents were unknown. This bar to disclosure was unsuccessfully appealed to the Secretary (J.A. 231-32).

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[3] The Government's contention notwithstanding (Brief, p. 8), the procedures specified by the Administrative Procedure Act must be followed when due process requires that a hearing be held whether or not a hearing is specified by the particular statute authorizing the agency action. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950); *Kiss & Co.* v. *U.S.*, 341 U.S. 907 (1954).

3. Respondents suggest that petitioners' contention that Section 3 of the Act bars the revocation of their grazing licenses while their grazing unit is pledged was not raised before the Secretary. That is not true, and the Court of Appeals rejected respondents' argument in treating the merits.

In urging the Interior Department to afford them a hearing, petitioners did point to the requirements of Section 3. That petitioners' grazing unit is pledged as security for bona fide loans and that such security will be impaired by the revocation of their grazing license stands admitted. The issue here is solely one of law as to the meaning and scope of Section 3. No further determinations of an administrative nature are required, and the matter stands ripe for adjudication. *Hormel* v. *Helvering*, 312 U.S. 552, 556-59 (1941).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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